Registered No. M—2.

GENERAL INDEX, TITLE, &c.

TO THE

INDIAN LAW REPORTS,

MADRAS SERIES.

VOL. XXXVI—1913.

JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council,

BY THE BOOK DEPOT BRANCH OF THE LEGISLATIVE DEPARTMENT OF THE BENGAL SECRETARIAT, CALCUTTA;

THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;

THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;

AND THE GOVERNMENT BOOK DEPOT, ALLAHABAD.

CORRIGENDA, VOLUME XXXVI.

Note to the Binder.

Substitute these pages *for* their corresponding ones in XXXVI Volume of the Indian Law Reports, Madras Series

„ 308, *headnote, line* 2, *for* 340 *read* 403.
„ 321 „ „ 1, *for* secs. 208, sub-sec., *read* sec. 208, sub-ss.
„ 378, *shortnote, line* 6, *for* 23 *read* 33.
„ 425, *line* 34, for *Bartle Ambalam* v. read *Bartle* v. *Ambalam*.
„ 436, *footnote, reference No.* (1), *for* (909) *read* (1909),
„ 548, *line* 36, *insert* or *after* thereof

MIRA MOIDIN ROWTHER v. NALLAPPERUMAL PILLAI.

AYLING, J.

action) to the 6th July 1908 (the date of filing the plaint in the Madura Sub-Court) as well as the period from the 6th July 1908 onwards and it is necessary for them to do so in order to save limitation. Admittedly section 14 of the Limitation Act cannot be extended to cover the period from the 14th June 1908 to the 6th July 1908. It is contended on behalf of plaintiffs that it is covered by section 4; and it is argued apparently with reason that the concessions awarded by the different sections of the Limitation Act are independent and cumulative. On the other hand, it is not denied that the proper Court in which the suit should have been filed reopened before the 6th July 1908 and respondents' vakil quotes the decision in *Abhoya Churn Chukerbutty* v. *Gour Mohun Dutt*(1), as authority for holding that in such circumstances section 4 cannot operate in plaintiff's favour. Appellant's vakil does not attempt to distinguish this case; but merely argues that the decision is wrong. I am not only prepared to follow the ruling in question, but entirely concur in it.

I consider that the only effect of section 4 is to extend the period of limitation from the 14th June 1908 to the date of reopening of the proper Court. When that date expired and no plaint was presented the suit became effectively time-barred and section 14 cannot assist plaintiffs, inasmuch as it could only take effect from the 6th July 1908.

I would dismiss the appeal with costs.

SPENCER, J.

SPENCER, J.—The cause of action or this small cause suit arose on June 14, 1905 and June 14, 1908 was therefore the last day on which plaintiff's suit could ordinarily be filed.

They actually filed their suit on July 6, 1908, in the Madura West Sub-Court, as on June 14 that Court was closed for the recess and July 6 was the reopening day. On an objection being taken by defendants to the jurisdiction of the Madura West Sub-Court the plaint was returned on February 17, 1909, for being presented to the Tuticorin Sub-Court and it was so presented on the next Court day, viz., February 19.

It has been found that the plaintiffs' action in going first to the Madura West Sub-Court was *bona fide* and not a mere device to save limitation. The learned judge who heard this revision petition held that plaintiffs were entitled under section 14 of the

(1) (1875) 24 W.R (C.R.), 26

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

SUBBA CHARIAR (PETITIONER, DECREE-HOLDER), APPELLANT,

1912 January 12 and 31 and March 6

v.

MUTHUVEERAN PILLAI AND SIX OTHERS (RESPONDENTS, JUDGMENT-DEBTORS), RESPONDENTS.*

Limitation Act (XV of 1877), arts 178 and 179—Article 179 applies to initiate proceedings—Previous orders in execution, effect of, as res judicata—*Civil Procedure Code (Act XIV of 1882), attachment under, when ceases, a question of intention—Erroneous order on a question of law, when* res judicata.

Previous orders passed in execution and allowing execution on a construction of a decree, as to mesne profits or as to interest or the like, have the force of *res judicata*, though the later application be in respect of a different subject-matter Thus if under the old Civil Procedure Code (Act XIV of 1882) attachment of several properties had been made, and more than three years after such attachment, sale of some of those properties was ordered, on the supposition that the attachment was then subsisting, that order to sell will act as *res judicata* when a subsequent application for sale is made within three years thereafter to sell other properties originally attached under the old Civil Procedure Code The question whether a particular attachment subsists at a certain time was a question of intention

Ram Kirpal v *Rup Kuari* (1884) I L R, 6 All, 269 (P C), *Venkatanarasimha Naidu* v *Pajammah* (1896) I.L R, 19 Mad, 54 and *Subbarama Ayyar* v *Nagammal* (1901) I L R, 24 Mad., 683, followed.

The rule that an erroneous decision on a question of law has not the force of *res judicata* does not apply to such a case

Palaniappa Chettiar v *Savari Naidoo* (1908) 18 M.L J., 548, and *Mangalathammal* v. *Narayanaswami Ayyar* (1907) I L R, 30 Mad, 461, distinguished.

It is well established that an application intended to revive and carry through a pending execution is not covered by article 179 of the Limitation Act (XV of 1877) as it is not an application to initiate a new execution.

Qamar-ud-din Ahmad v *Jawahir Lal* (1905) I L R, 27 All, 334 (P C) and *Suppa Reddiar* v *Avudai Ammal* (1905) I.L R, 28 Mad, 50 (F.B), followed

The right to apply to continue execution in such cases accrues from day to day and will not be barred until three years have elapsed after the proceedings have ceased to be pending So the application is not barred under article 178 either

Chalavadi Kotiah v *Poloori Alimelammah* (1908) I.L R, 31 Mad., 71, followed.

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* Civil Miscellaneous Appeal No 78 of 1910

SUBBA CHARIAR v. MUTHUVEERAN PILLAI.

APPEAL against the order of R. D. BROADFOOT, the District Judge of Coimbatore, in Execution Petition No. 15 of 1909 in Original Suit No. 40 of 1896.

The following facts are taken from the judgment of the Lower Court:—

"This is an application for sale of part of the property attached in Execution Petition No. 2 of 1904.

"The property was attached on 19th and 20th April 1904. In Execution Petition No. 5 of 1908, dated 30th September 1907, the sale of some items was asked for and sale was ordered (in my view this order was wrong).

"Execution Petition No. 2 of 1904 contains a prayer for sale which was not ordered as the decree-holder omitted to produce encumbrance certificate and draft proclamation for sale.

"On 26th July 1904 my predecessor dismissed the petition for want of prosecution. On 12th July 1909 the sale of some other items is asked for.

"Counter-petitioner urges that the attachment lapsed three years after it was made or anyhow three years after dismissal of the petition on 26th July 1904.

"Petitioner's pleader says that *Chalkadi Kotiah* v. *Poloori Alimelammah*(1) means that an attachment continues for ever, or at the lowest for six years, *i.e.*, three years after the expiration of the period of three years. The latter seems to me to be the real meaning of the ruling.

"But this concession seems to be held in the above ruling to apply to cases in which the Court was bound to Act and failed to do so and not to cases in which the party was bound to do something and failed to do it. *Ambica Pershad Singh* v. *Surdhari Lal*(2).

"I think in the present case the proper limitation is three years from the date of the order dismissing the petition for failure to produce draft proclamation, *i.e.*, the limitation terminated on *27th July 1907*.

"It follows that the present petition is barred and is dismissed. No costs as the rulings are conflicting."

The decree-holder appeals.

N. Rajagopalachariar for appellant.

(1) (1908) I.L.R., 31 Mad., 71. (2) (1884) I.L.R., 10 Calc., 851 at p. 856 (F.B.).



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The decree-holder appeals.

N. Rajagopalachariar for appellant.

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JUDGES OF THE HIGH COURT.

(1st January—31st December, 1913.)

CHIEF JUSTICE.

The Hon'ble Sir Charles Arnold White, *Kt.* (Bar.-at-Law).

PUISNE JUDGES.

The Hon'ble Sir Ralph Sillery Benson, *Kt.*, M.A., LL.B. (Bar.-at-Law), I.C.S. (*Retired 14th July*, 1913.)

The Hon'ble Sir John Edward Power Wallis, *Kt.*, M.A. (Bar.-at-Law).

The Hon'ble Mr. Leslie Creery Miller, I.C.S.

The Hon'ble Sir C. Sankaran Nair, *Kt.*, B.A., B.L., C.I.E.

The Hon'ble Mr. Abd-ur-Rahim, M.A. (Bar.-at-Law). (*On deputation with the Royal Commission on the Public Services in India.*)

The Hon'ble Mr. Faiz Hasan Badruddin Tyabji, M.A. (Bar.-at-Law). (*Offg from 2nd January*, 1913.)

The Hon'ble Mr. P. R. Sundara Aiyar, B.A., B.L. (*On combined leave from 23rd July*, 1913 *and died on 22nd December*, 1913.)

The Hon'ble Mr. William Bock Ayling, I.C.S. (*Resumed charge on 14th July*, 1913.)

The Hon'ble Mr. Francis DuPre Oldfield, I.C.S. (*Offg. from 27th November*, 1912 *till 14th July*, 1913 *and permanent from 14th July*, 1913.)

The Hon'ble Mr. Charles Gordon Spencer, I.C.S. (*Offg. from 12th September*, 1913.)

TEMPORARY ADDITIONAL JUDGES.

The Hon'ble Mr. James Herbert Bakewell. (*On privilege leave for* 1 *month and resumed office on 12th August* 1913.) (*Temporary for* 2 *years from 23rd January*, 1912.)

The Hon'ble Mr T. Sadasiva Aiyar, B.A., M.L., Diwan Bahadur. (*Temporary for* 2 *years from 12th February*, 1912.)

ADVOCATE-GENERAL.

The Hon'ble Mr. Fredrick Hugh Mackenzie Corbet (Bar.-at-Law).

APPELLATE CRIMINAL.

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ACCRETION—*Island formed in the mouth of a river subsequently becoming joined to the mainland, ownership of*]: Where an island is formed in the mouth of a river, which subsequently becomes part of the mainland through the drying up of the intervening channel, the increase being perceptible or sudden, the land which formed the island is not an accretion to the mainland but merely an "adjunction" and the owner of the mainland obtains no proprietary rights therein as against Government

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[illegible] (1907) [illegible]

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the circumstances [illegible] cases show that where there is substantial [illegible] in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there and where there are several houses belonging to the tarwad and a member lives in one of them and where the karnavan's conduct has afforded a valid excuse for a member living away from the tarwad house separate maintenance may be awarded. There may be other grounds which on social or economical reasons may be considered proper. Though a member of an Aliyasantana or Marumakkathayam tarwad may not be entitled to a partition or a specific portion of the income which may be an indirect method of enforcing a partition, he is still a co-owner with the karnavan of the tarwad property and he may in a proper case be entitled to separate maintenance. Waiver (arising from conduct, etc.) is a good plea to a claim for past maintenance. *Raja Yerlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yerlagadda Durga Prasada Nayudu* [(1901) I.L.R., 24 Mad., 147 (P.C.)], followed. Considering the special and common expenses which an ejman or karnavan has to incur out of the income of the family it is wrong to award a numerically proportionate share of the income to any particular member. The law as to the respective rights of an ejman or karnavan and the junior member of the tarwad, discussed with reference to decided cases.

Marudevi v. *Pammakka* (1913) I.L.R., 36 Mad., 203.

AMARAM TENURE, *resumable*,—*See* MADRAS ESTATE LANDS ACT (I OF 1908).

AMENDMENT OF PLAINT, *for removal, allowed, to avoid further litigation*—*See* CHURCH.

——————— *when allowed*,—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. VI, r. 17.

APPEAL IN CRIMINAL CASE *See* PRIVY COUNCIL.

APPELLATE COURT, *all powers of the Original Court, vest in*,—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 568.

——————— *power of, to admit additional evidence*—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882) SEC. 568.

——————— *power of, to ammend*—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XLI, RULE 23.

APPORTIONMENT *of compensation between Zamindar and occupancy ryot, Principles of*,—*See* LAND ACQUISITION ACT.

ARBITRATION: *See* CIVIL PROCEDURE CODE (ACT V OF 1908), SCH. II, PARA. 17.

ATTACHMENT, *absence of suit questioning, no bar to subsequent suit on sale*:—*See* LIMITATION ACT (XV OF 1877), ART. 120.

ATTESTATION *by A, with knowledge of the contents when he was the owner, effect of*.—*See* ESTOPPEL—EVIDENCE ACT (I OF 1872), SEC. 115.

AUTREFOIS ACQUIT: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 107.

———————*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 403 (1).

BAIL.—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 107, CL. 4.

BANKER AND CUSTOMER—*Payment to Bank with instructions as to disposal, effect of*—"*In suspense*" *account, meaning of*: When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank, and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B*. *Held*, on appeal from *The Official Assignee of Madras* v. *Rajam Ayyar* [(1910) I.L.R., 33 Mad., 299], by MILLER and MUNRO, JJ., that the bank held the amount as agents of *A* for remittance to *B*, and not as bankers either of *A* or *B*. *The Official Assignee of Madras* v. *Smith* [(1909) I.L.R.,

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CERTIFICATE TO MINOR, *may be granted*: See SUCCESSION CERTIFICATE ACT.

CERTIORARI, WRIT OF,—*Power of High Court to issue—Income-tax Act (II of 1886)—Criminal Procedure Code (Act V of 1898), sec. 476—when order ...*

have jurisdiction, a petition may be entertained by the High Court to set aside the order of such Court passed under section 476 of the Criminal Procedure Code (Act V of 1898), it not being necessary for the petitioner ...

In re *Nataraja Iyer* ... (1913) I.L.R., 36 Mad., 72

CHARGE—*Government Revenue, due on land—Common burden—Payment by one sharer—Right to claim charge on other shares—No right to a personal decree.*] When several shares in the same land or when several lands are liable under a common burden (such as, Government revenue, as in the present case), the discharge of the whole burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums for which they were equitably liable But the common burden being only on the land or lands and not recoverable from the sharers personally, there can only be a charge and no personal decree *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz* [(1903) I.L.R., 26 Mad., 686 (F.B.)], followed. *Alayakammal* v. *Subbaraya Goundan* [(1905) I.L.R., 28 Mad., 493] and *Parbhu Narain Singh* v. *Babu Beni Singh* [(1909) 14 C.W.N., 361], referred to *Subramania Chetty* v *Mahalinghaswami Sivan* [(1910) I.L.R., 33 Mad., 41 (F.B.)], distinguished.

Amman Pariyaya v *Pakran Haji* ... (1913) I.L.R., 36 Mad., 493

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CHURCH—Prevailing form of worship [illegible]

litigation—*Civil Procedure Code* (*Act XIV of* 1882), *sec* 30—*Defendants on record objecting to represent others—Jurisdiction of Court to allow—Limitation Act* (*IX of* 1908) *sec.* 10—*No limitation against one holding properties as trustee—Whole income used evidence of dedication of lands—Evidence Act* (*I of* 1872), *sec.* 57—*Only proof of notorious facts of public history dispensed with*:) When it is found that for a period of more than sixty years before the defendants' (parishioners') secession, the Roman Catholic form of worship prevailed in their parish church the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro-Chaldean at the inception. As to the right of management of a particular Roman Catholic Church, and its properties, besides usage, other things, such as the rights of ecclesiastical authorities according to the canon law can be looked to, though in some churches on the West Coast, parishioners have more or less control over the management of the properties. A single trustee is not entitled to recover possession of the properties appertaining to the trust from another trustee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust. Even if the defendants or some of them were once entitled to the trustees along with the Vicar *Held*, that they by their secession from the Catholic Church and by their repudiation of the trusts of the institution which in law works a forfeiture of their office, disentitled themselves to hold the office of trustee and that they had in law no answer to a suit for their removal. *Marian Pillai* v *Bishop of Mylapore* [(1894) I.L.R., 17 Mad., 447], followed. Even if they offered to return to their allegiance to the Romish Church, it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee. Even if the plaintiff had not asked for the removal of the defendants, an amendment to that effect can be allowed in order to avoid future litigation and in the interests of the trust. A plaintiff may be allowed to sue certain defendants under section 30, Civil Procedure Code (Act XIV of 1882), as representing certain others in spite of the objection or refusal of the defendants on record to represent the others, the consent of the defendants on record not being necessary. *Andrews* v. *Salmon* [(1888) Weekly Notes, 102], followed. Where a defendant claims to hold certain properties as a trustee and not as his own, there is no period of limitation within which a suit must be brought to recover them on behalf of the trust. Limitation Act (IX of 1908), sec 10. The right to the properties of the trust must go with the right to the office of trustee. *Gnanasambanda Pandara Sannadhi* v *Velu Pandaram* [(1900) I.L.R., 23 Mad., 271 (P.C.)] and *Gossami Sri Gridharji* v. *Romanlalji Gossami* [(1890) I.L.R., 17 Calc., 3 (P.C.)], followed. The fact that the entire income of certain properties has always been utilised for a church is very good evidence that the properties belong to it No deed of endowment is necessary to prove a dedication of certain properties in favour of a trust Under section 57 of the Evidence Act the Court could dispense with evidence only of what may be regarded as notorious facts of public history, and cannot treat letters though 75 years old without any sort of legal proof, as proof of where certain missionaries were living or when they died. "Taylor on Evidence," tenth edition, volume II, paragraph 1785, and "Wigmore on Evidence," volume III, section 1699, referred to

Ambalam Pakkiya Udayan v. *Bartle* ... ... (1913) I.L.R., 36 Mad., 418

CIVIL PROCEDURE CODE (ACT XIV OF 1882), *attachment under, when ceases, a question of intention.*—*See* LIMITATION ACT (XV OF 1877), ARTS 178 AND 179.

———— sec. 30. *See* CHURCH.

———— sec. 43. *See* PARTITION.

———— sec 231—[*Order XXI, rule* 15, *Civil Procedure Code* (*Act V of* 1908)]—*Execution application by one only of the decree-holders, maintainability of—Section* 258, *Civil Procedure Code* (*Act XIV of* 1882)—*Order XXI, rule* 2, *Civil Procedure Code* (*Act V of* 1908)—

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value)—Actual possession with tenants who were willing to pay to whomsoever was a trustee—Prayer for possession unnecessary.] Where the lands of a temple were in the actual possession of tenants who were willing to pay rent to whomsoever was the trustee, a suit which merely prays for the recovery of the office of trustee and for an injunction against the defendants who were in possession of the office, which injunction was valued at a substantial figure, *viz.*, Rs. 2,000, does not offend against the proviso to section 42 of the Specific Relief Act (I of 1877) as the plaintiff had asked for such possession as he could under the circumstances and as the possession of the tenants would not be adverse to the plaintiff after his recovery of office. *Kunj Biharji v Keshavlal Hirlal* [(1904) I L R, 28 Bom., 567], followed. *Pathnasalapathi Pillai v Ramasami Aiyar* [(1910) I.L.R., 33 Mad., 452], *Abdulkadar v Mahomed* [(1892) I L R., 15 Mad, 15], *Narayanan v. Shan-* ... *v Rama Iiayer* ... *Paramasivaran* ... *lamanta Kumare* ... here an office of ... ally a hundred years and by nobody else the office must be held to be hereditary in that family ... to secu ... suit to ... family, ... (1906) I L R, 33 Calc, 789], referred to A scheme once settled by a court cannot ... *Attorne* ... *Charit* ... 60 L T ... scheme ... (wheth ... a hereditary trusteeship and have brought a suit to enforce such a right before the settlement of the scheme, and a decree framing a scheme is a bar to a suit by such a person, even though the denial of such a right of suit might act very prejudicially to his interests and even though his application to be made a party to the scheme suit might have been rejected Section 539 confers upon the courts in this country the same powers that the courts in England possessed at the time of its enactment, and the principles of English law are applicable *Prayag Doss Ji Varu, Mahant v Tirumala Srirangacharlavaru* [(1905) I.L R, 28 Mad, 319 at p. 324], *Chintaman Bajani Dev v Dhondo Ganesh Dev* [(1891) I L R, 15 Bom, 612], *Annaji v Narayan* [(1897) I L R, 21 Bom, 556] and *Prayag Doss Ji Varu v. Tirumala Srirangacharla Varu* [(1907) I L R, 30 Mad, 138 (P C.)], referred to

Ramados v Hanumantha Rao . . ... . (1913) I.L.R, 36 Mad, 364

———— SEC. 568—"*or for any other substantial cause," effect of—Power of an Appellate Court to admit additional evidence—"Other" not ejusdem generis—" to enable it to pronounce judgment", meaning of—Appellate Court, all powers of Original Court vest in:*] An Appellate Court has power to admit further evidence under the clause "or for any other substantial cause" in section 568, Civil Procedure Code, which clause need not be *ejusdem generis* with the causes stated in the pre- ...

Andiappa Pillai v. Muthukumara Thevan ... ... (1913) I.L.R, 36 Mad., 477

CIVIL PROCEDURE CODE (ACT V OF 1908), Order VI, rule 17—*Amendment of plaint, when allowed—New relief prayed, barred by limitation—Just prayer, no injustice to defendant, and no new facts.*] Under Order VI, rule 17, Civil Procedure Code, a petition for an amendment of a plaint based on no new facts and asking for a further relief, viz., recovery of money, may be allowed even though it be barred by limitation between the date of the

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the local limits at the time the magistrate takes action under the section' *Ketabai v Queen-Empress* [(1900) I L R., 27 Calc, 993], not followed. A contrary view would defeat the object of the section, viz, prevention of crime, as then it would be impossible to deal under the section with wandering gangs of criminals having no fixed residence or with habitual thieves or desperate characters belonging to foreign territories, who infest British India

In re Rangan .. .. (1913) I L R., 36 Mad, 90

———— sec 145— *Order under, no bar to order under sec* 107 *on same facts* —*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 107.

————SS. 177 And 531 —*See* INDIAN PENAL CODE.

———— SEC 195:—*See* PERJURY.

———— SEC 195, CL. 7 (c)—*Order granting sanction by Presidency Small Cause Court—Appeal to High Court—Jurisdiction to Appellate and not Original Side—'Principal Court of Original Jurisdiction' meaning of.*] From an order of the Presidency Small Cause Court giving or refusing sanction, an appeal lies to the High Court generally and not to any particular branch of it But the jurisdiction it exercises being Appellate and not Original, it is the Appellate side alone that can dispose of such matters The effect of clause 7 (c) of section 195, Criminal Procedure Code, is merely to designate the Court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises in dealing with orders of the Small Cause Court. Its effect is only to make the High Court the appellate tribunal [*Sew Bolloch Singh v. Ramdhan Bania* [(1910) 14 C.W N, 806], followed. When one Court deals with a judgment of another Court having power to confirm or to set it aside, the jurisdiction it exercises is appellate jurisdiction. Original jurisdiction is the jurisdiction in original proceedings instituted in the Court, whether suits, petitions or other proceedings The Original Side of the High Court is not a different Court from the Appellate Side: the Court is one, but it exercises both original and appellate jurisdiction.

Jamna Doss v. Sabapathy Chetty . .. .. (1913) I.L R., 36 Mad. 138

———— SS 255, 253, 271, 272 AND 428, SUFFICIENCY OF—*See* EVIDENCE ACT (I of 1872) Section 21.

————sec. 349 —*'Shall pass such order as he thinks fit.' meaning of:*] The words 'such order as he thinks fit' in section 349, Criminal Procedure Code, do not empower the Superior Magistrate to send the case back to the Sub-Magistrate for disposal but only empower him to pass such final order disposing of the case as he may think fit

Re Ponnusamy Nadan ... . (1913) I.L R., 36 Mad, 470

————, SEC 403 (1)—Autrefois acquit—*Section* 403 (4), *scope of—Sanction to prosecute, section* 195—*Indian Penal Code* (*Act* XLV *of* 1860), *ss* 182 *and* 211:] Sanction was obtained by the complainant to prosecute the accused for an offence under section 211, Indian Penal Code. Accused was tried and convicted, but the conviction was quashed by the High Court in revision on the ground that the accused had not committed an offence under that section but under section 182, Indian Penal Code, for which no sanction had been granted. Complainant thereupon obtained sanction to prosecute the accused under section 182, Indian Penal Code On accused pleading in bar of prosecution section 403 (1), Criminal Procedure Code, the Magistrate overr
confirmed by the Court of Session.
Held, that the prosecution was barre
cedure Code *Held further*, that sect
and status of the tribunal when it refers to competency to try an offence and that a sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal but only a condition precedent for the institution of proceedings.

In re Ganapathi Bhatta ... ... (1913) I.L.R., 36 Mad., 308

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the local limits at the time the magistrate takes action under the section.' *Ketabai v Queen-Empress* [(1900) I L R., 27 Calc, 993], not followed. A contrary view would defeat the object of the section, viz., prevention of crime as then it would be impossible to deal under the section with wandering gangs of criminals having no fixed residence or with habitual thieves or desperate characters belonging to foreign territories, who infest British India

In re *Rangan* .. .. . . (1913) I L R., 36 Mad., 96

—————— sec. 145—*Order under, no bar to order under sec. 107 on same facts* —See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 107.

—————— SS. 177 And 531.—*See* INDIAN PENAL CODE.

—————— SEC 195—*See* PERJURY.

—————— SEC 195, CL 7 (c)—*Order granting sanction by Presidency Small Cause Court—Appeal to High Court—Jurisdiction to Appellate and not Original Side—'Principal Court of Original Jurisdiction' meaning of*:] From an order of the Presidency Small Cause Court giving or refusing sanction, an appeal lies to the High Court generally and not to any particular branch of it But the jurisdiction it exercises being Appellate and not Original, it is the Appellate side alone that can dispose of such matters. The effect of clause 7 (c) of section 195, Criminal Procedure Code, is merely to designate the Court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises in dealing with orders of the Small Cause Court. Its effect is only to make the High Court the appellate tribunal [*Sew Bollock Singh v. Ramdhan Bania* [(1910) 14 C.W N, 606], followed. When one Court deals with a judgment of another Court having power to confirm or to set it aside, the jurisdiction it exercises is appellate jurisdiction. Original jurisdiction is the jurisdiction in original proceedings instituted in the Court, whether suits, petitions or other proceedings The Original Side of the High Court is not a different Court from the Appellate Side: the Court is one, but it exercises both original and appellate jurisdiction.

Jamna Doss v. Sabapathy Chetty .. .. . (1913) I.L R., 36 Mad. 138

—————— SS. 255, 259, 271, 272 AND 428, SUFFICIENCY OF—*See* EVIDENCE ACT (I of 1872) Section 21.

—————— sec 349—*'Shall pass such order as he thinks fit' meaning of*:] The words 'such order as he thinks fit' in section 349, Criminal Procedure Code, do not empower the Superior Magistrate to send the case back to the Sub-Magistrate for disposal but only empower him to pass such final order disposing of the case as he may think fit

Re *Ponnusamy Nadan* ... . (1913) I.L.R., 36 Mad, 470

——————, SEC 403 (1)—Autrefois acquit—*Section 403 (4), scope of—Sanction to prosecute, section 195—Indian Penal Code (Act XLV of 1860), ss 182 and 211*:] Sanction was obtained by the complainant to prosecute the accused for an offence under section 211, Indian Penal Code. Accused was tried and convicted, but the conviction was quashed by the High Court in revision on the ground that the accused had not committed an offence under that section but under section 182, Indian Penal Code, for which no sanction had been granted Complainant thereupon obtained sanction to prosecute the accused under section 182, Indian Penal Code On accused pleading in bar of prosecution section 403 (1), Criminal Procedure Code, the Magistrate overruled the objection and his order was confirmed by the Court of Session. Accused petitioned the High Court, *Held*, that the prosecution was barred by section 403 (1), Criminal Procedure Code *Held further*, that section 403 (4) refers to the character and status of the tribunal when it refers to competency to try an offence and that a sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal but only a condition precedent for the institution of proceedings.

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decree can be passed against them, although the parties on record *eo nomine* may be made personally liable. The extent of the rule applicable to a case of defendants sued as partners is laid down in Order XXI, rule 50, Civil Procedure Code. A firm was sued in Singapore in the firm's name but only one of the partners was served and a decree was passed against "defendants" for a certain sum. On the judgment of the Singapore Court a suit was filed in British India against the individual partners of the firm and the representatives of a deceased partner. *Held*, that the partners who were not served in the Singapore suit were not personally liable and that no personal decree can be passed against them in the present suit, [illegible] the [illegible] inst [illegible] vered [illegible] an [illegible] hose [illegible] ishna- [illegible] ayar [illegible]

Sahib Thambi v. Hamid ... ... (1913) I.L.R., 36 Mad., 414

GANJAM AND VIZAGAPATAM AGENCY RULES—*Agent's order under sec XVIII—Maintainability of petition to High Court under Rule XX—Interference of High Court in proper cases—Section 244, bar by, who can set up:*] A petition lies to the High Court under Rule XX of the Ganjam and Vizagapatam Agency Rules, even though the Agent acted under Rule XVIII in dismissing an appeal. *Jagannadha v. Gopanna* [(1895) I.L.R., 16 Mad., 229], dissented from. An order of the Agent summarily dismissing an appeal is a decree as it disposes of the rights of the parties, and under Rule XX the High Court may in a proper case (as here, where the Agent gives no reasons for dismissal) direct the Agent to review his judgment. A person who was not a party to a previous suit cannot set up the effect of an order in execution in that suit as a bar to a suit against him. *Quære*, whether, when section 244, Civil Procedure Code, does not apply to Agency tracts, the principle of that section applies.

Sri Sri Sri Vikrama Deo v. Raghunatha Patro ... .. (1913) I.L.R., 36 Mad., 128

GIFT *to a Mopla governed by Muhammadan law on his marriage not void on his wife's death or divorce* —*See* MUHAMMADAN LAW.

GROUND-RENT, *exemption from, to be express*.—*See* RIGHT OF SUIT

GUARDIANS AND WARDS ACT (VIII OF 1890)—*Jurisdiction of District Court —No power to order payment of money for minor's marriage by person not guardian—Concurrent Jurisdictions—When order passed under one jurisdiction can be taken to be passed under another:*] The Guardians and Wards Act (VIII of 1890) does not give the District Court any power or authority over persons other than the guardian or the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian, or whether a particular guardian should be removed or not and for the purpose of restoring the ward to the custody of the guardian. Under the Guardians and Wards [illegible] the order cannot be treated as a decree in a suit. The two jurisdictions are wholly distinct though exercisable by the same official. *Sadasiva Pillai v. Ramalinga Pillai* [(1875) 2 I A., 219] and *Ledgard v. Bull* [(1887) I.L.R., 9 All., 191 (P.C.)], distinguished.

Somakka v. Ramiah ... .(1913) I.L.R., 36 Mad., 39

HANDWRITING, *expert in, value to be attached to evidence of*,—*See* EVIDENCE. 109

HEREDITARY VILLAGE OFFICES ACT (Madras Act III of 1895): *See* PENSIONS ACT.

HIGH COURT, *appeal to—Order granting sanction by Presidency Small Cause Court—jurisdiction to appellate and not to Original Side*—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195, CL. 7 (c).

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HIGH COURT, *jurisdiction of,*—*See* CIVIL PROCEDURE CODE (Act V of 1908) O. XLVI, r. 1 and sec 141

————, *power of, to issue writ of certiorari.*—*See* CERTIORARI.

HINDU LAW —*See* CIVIL PROCEDURE CODE

———— *Adoption by mother with the assent of a deceased son—Objection by existing sapinda—Invalidity of adoption*] A consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved of or is objected to by the persons who are the nearest sapindas at the time the adoption is actually made Strange's Hindu Law vol I, p 80 and Sircar on Adoption p 255, not followed There is a distinction between the case of an adoption in an undivided family and that in a divided family, as regards the persons whose assent is sufficient *The Collector of Madura* v *Moottoo Ramalinga Sathupathy* [(1868) 12 M.I.A., 397 at p. 442], *Vellanki Venkata Krishna Rao* v *Venkata Rama Lakshmi* [(1876) I L R, 1 Mad., 174] and *Subrahmanyam* v *Venkamma* [(1903) I.L.R, 26 Mad., 627 at p 635], referred to

Mami v. *Subbarayar* . (1913) I.L.R., 36 Mad., 145

———— *Adoption, validity of—Sapinda, consent of, obtained for consideration—Indian Evidence Act (I of 1872), sec 32, sub-ss 3 and 5—admissibility of statement made by deceased person*] Where under the Hindu Law, the consent of a sapinda is required to validate an adoption by a widow and that consent is obtained in exchange for a valuable consideration the transaction will vitiate the adoption. *Rami Reddi* v. *Rangamma* [(1901) 11 M.L.J., 20], followed. *Srinivasa Ayyangar* v.

section 32, sub-section 3 of the Indian Evidence Act, it being a statement made against his pecuniary or proprietary interest :—*Held also,* that the statement was admissible under section 32, sub section 5, as it related to the existence of a relationship, and this notwithstanding that the relationship was not in dispute at the time when the statement was made.

Dasaloo Ammal v. *Balasundara Mudaliar.* .. (1913) I.L.R., 36 Mad., 19

———— *Inheritance (Mitakshara),—Succession to stridhanam—Preference of co-wife's daughter to sapindas of husband.* Under the Mitakshara law of inheritance, the daughter of a co-wife of a deceased woman married in one of the approved forms is entitled to succeed to her stridhanam property in preference to the sapindas of her husband, such as his father's brother's son. *Placitum* 11 of section XI of Chapter II, Mitakshara, applied Colebrooke's translation of 'sapinda' in that *placitum* as 'Kinsmen allied

Ranja Pillai v. *Sivabagyathachi* .. .. (1913) I.L.R., 36 Mad., 116

is apparently used in the sense of its being put forward in some way for one of the purposes mentioned in section 463, Indian Penal Code. Although by virtue of section 531, Criminal Procedure Code, an order in an inquiry made by a magistrate not having local jurisdiction will not be set aside unless there is in fact a failure of justice, yet when a committal is made by such a magistrate to a Court of Session which has no jurisdiction to try the case under section 177, Criminal Procedure Code, such commitment is illegal. The High Court has no power to transfer a case thus committed to a court not having jurisdiction to another court having jurisdiction. The commitment must be quashed.

Assistant Sessions Judge, North Arcot v. Ramammal (1913) I.L.R., 36 Mad., 387

————————————, **sec. 471**—*"Using" definition of:* The mere production of a document in obedience to the summons of a court cannot amount to 'using' it within the meaning of section 471, Indian Penal Code. *Assistant Sessions Judge, North Arcot v. Ramammal* [(1913) I.L.R., 36 Mad., 387], followed. Where a document having been produced upon an order of the court the witness gives false evidence regarding it, such giving of false evidence cannot by itself be considered a fraudulent user of the document within the meaning of section 471, Indian Penal Code. A mere statement that a document is genuine does not amount to using it as genuine.

Re Kuthiah Chetty (1913) I.L.R., 36 Mad., 392

————————————, **sec. 499**—*Defamation—Absolute privilege, doctrine of, applicable under section 499—Accused, statement of, in course of judicial proceedings.*] A person charged with an offence was, on his trial, asked by the magistrate what he had to say and in reply made a statement defamatory of one of the prosecution witnesses. *Held*, that the statement was absolutely privileged and that he was not liable to be punished in respect thereof for an offence under section 499, Indian Penal Code. Although the English doctrine of absolute privilege is not expressly recognized in the section it does not necessarily follow that it was the intention of the legislature to exclude its application from the law of this country.

In re Venkata Reddi . (1913) I.L.R., 36 Mad., 216

INDIAN RAILWAYS ACT (IX OF 1890) sec. 140—*Notice of suit, upon whom to be served.*] Under section 140, Indian Railways Act (IX of 1890), notice of suit against a Railway Company can only be served upon the Agent unless it can be shown by evidence that some other officer of the Company had authority to receive the notice.

Seshachellam Chetty v. Traffic Manager, H. H. The Nizam's Guaranteed State Railway Co. Ltd. .. (1913) I.L.R., 36 Mad., 65

INJUNCTION, *when to be granted*—See EASEMENTS.

INTEREST, *exorbitant, court's power to curtail, etc.:* See CONTRACT ACT (IX OF 1872), SEC. 74

————, *grounds for reduction of:* See INDIAN CONTRACT ACT (IX OF 1872), SEC. 16

ISLAND, *formed at the mouth of a river, etc., ownership of.* See ACCRETION

JURISDICTION See INDIAN PENAL CODE, SS. 463 AND 471

———— **OF DISTRICT COURT** See GUARDIANS AND WARDS (ACT VIII OF 1890)

———— **OF HIGH COURT:** See CIVIL PROCEDURE CODE (ACT V OF 1908), order XLVI, rule 1 and sec. 141.

———— **OF MAGISTRATES** *over outsiders found within local limits:* See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 110

———— **TO APPELLATE AND NOT TO ORIGINAL SIDE**—*See* CRIMINAL PROCEDURE CODE

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presented, the suit when presented to the new court is a new suit and cannot be regarded as a continuation of the infructuous suit in the wrong court This is the basis of section 14 of the Limitation Act (XV of 1877). Hence if the suit when originally filed in the wrong court would have been ordinarily barred by limitation as by being barred during the holidays of that court, after which alone it was filed, the suit when filed in the new court must be held to be barred in spite of section 14 of the Limitation Act. *Mohidin Rowthen* v. *Nallaperumal Pillai* [(1911) 21 M L J., 1000], followed. *Takuroodeen Mahomed Eshan Chowdry* v. *Kurimbux Choudry* [(1865) 3 W R (C R) 20], *Khelat Chunder Ghose* v *Nuseebunnisa Bibee* [(1871) 16 W R. (C R), 47] and *Assan* v. *Pathumma* [(1899) I.L R, 22 Mad, 494], distinguished.

Seshagiri Row v *Vajra Velayudam Pillai* ... .. (1913) I.L R., 36 Mad, 482

LIMITATION ACT (XV OF 1877), ART 120—*Attachment of wrong man's property —No suit filed—Subsequent sale of property under attachment—Fresh cause of action from date of sale—Article 120, applicable—Absence of suit questioning attachment, no bar to subsequent suit on sale*] Though attachment of a person's land as if it belonged to another, gives the owner a cause of action, on which he could have brought a suit, but did not, yet the sale of the same at a later date is a fresh and greater invasion of his right and gives him a fresh cause of action on which he could sue within six years from the date of sale under article 120 of the Limitation Act. Though he might have sued after the attachment he was not bound to sue. The sale though held in pursuance of the attachment was not a necessary consequen [illegible]
10 (note)] [illegible]
rights in [illegible]
notwithst[illegible]
objection to the attachment be disallowed. *Narasimha Rau* v. *Gangaram* [(1908) 18 M L J., 590], referred to

Anantharazu v *Narayanarazu* .. .. . (1913) I L R., 36 Mad., 383

———————, SCHED. II, ART 106—*Suit for partnership account—Presumption of dissolution of partnership from facts of case—Cessation of annual accounts rendered yearly for many years and rendering of final account showing division of capital and revenue*] The question in this appeal which arose out of a suit brought in 1902 for a partnership account and to recover the plaintiffs' share in the properties of a business carried on by them and the defendants, was whether the suit was barred by [illegible] dissolution of [illegible] ffirming the [illegible] partnership [illegible] 1891, ceased in the latter year and, on 12th April 1891, a final account showing the division of both capital and revenue was made out, the defendants afterwards carrying on the business without any interference from the plaintiffs, the presumption was in favour of the dissolution of the partnership as at the definite date of the year when the account was thus closed. And their Lordships were of opinion that these facts taken with the other acts [illegible]

1877).

Joopoody Sarayya v. *Lakshanaswamy* . (1913) I L R, 36 Mad [P.C.], 185

——— SEC 14 *See* LIMITATION

——— (IX OF 1908), ARTS. 44 AND 91: *See* EXECUTOR, *sale by.*

———————AR S 178 AND 179 [illegible]
proceedings—Previous orde[illegible]
Procedure Code (Act XIV[illegible]
of intention—Erroneous or [illegible]

5

Previous orders passed in execution and allowing execution on a construction of a decree, as to *mesne* profits or as to interest or the like have the force of *res judicata*, though the latter application be in respect of a different subject matter. Thus if under the old Civil Procedure Code (Act XIV of 1882) attachment of several properties had been made, and more than three years after such attachment, sale of some of those properties was ordered, the supposition that the attachment was then subsisting, that order to sell will act as *res judicata* when a subsequent application for sale is made within three years thereafter to sell other properties originally attached, under the old Civil Procedure Code The question whether a particular attachment subsists at a certain time was a question of intention. *Ram Kirpal* v. *Rup Kuari* [(1884) I.L.R., 6 All, 269 (P.C.)], *Venkatanarasimha Naidu* v. *Papammah* [(1896) I.L.R., 19 Mad., 54], and *Subbarama Ayyar* v. *Nagammal* [(1901) I.L.R., 24 Mad., 683], followed. The rule that an erroneous decision on a question of law has not the force of *res judicata* does not apply to such a case. *Palaniappa Chettiar* v. *Sarara Naidoo* [(1908) 18 M.L.J., 548] and *Mangalathammal* v. *Narayanaswami Aiyar* [(1907) I.L.R., 30 Mad., 461], distinguished. It is well established that an application intended to revive and carry through a pending execution is not covered by article 179 of the Limitation Act (XV of 1877) as it is not an application to initiate a new execution *Qamar-ud-din Ahmad* v *Jawahir Lal* [(1905) I L R, 27 All., 334 (P.C).] and *Suppa Reddiar* v. *Avudai Ammal* [(1905) I L R, 28 Mad, 50 (F.B)], followed. The right to apply to continue execution in such cases accrues from day [illegible] years have elapsed after the [illegible] the application is not barred [illegible] v *Poloori Alimelammah* [(1906) [illegible] Mad, [illegible]], followed.

Subba Chariar v *Muthuveeran Pillai* ... ... (1913) I L R, 36 Mad, 553

2.——————, Art. 182—*Execution of decree of Presidency Small Cause Court—Section 48 Civil Procedure Code* [illegible] *to such court-* [illegible] *12 years old—* [illegible] *no bar:*] Alth [illegible] it, to another [illegible] execution is [illegible] court which passed them A different rule will lead to anomalous consequences A decree of the Presidency Small Cause Court [illegible] 1896 was transferred for exec[illegible] Civil Procedure Code, not being [illegible] *Held*, that an application for [illegible] Court in 1910 was not barred, [illegible] article 182 of the Limitation A[illegible] Procedure Code, was applicable to the City Civil Court, was immaterial. *Sambasiva Mudaliar* v. *Panchanada Pillai* [(1908) 17 M L.J. 441; s.c. (1908) I.L R, 31 Mad, 24], *Tincowrie Dawn* v *Debendro Nath Mookerjee* [(1890) I L R, 17 Calc, 491], and *Jogemaya Dasi* v. *Thackomoni Dasi* [illegible] *Her Highness Ruckmaboye* v. [illegible]], not applicable—A transfer [illegible] other court does not make the [illegible] after transfer the control of [illegible] in several respects, in the hands of the court which passed the decree, *e g*, recognition of assignment, application for execution against legal representative, stay of execution, issuing precepts and certificate of non-execution or partial execution, etc

Sree Krishna Doss v *Alamlu Ammal* ... ... (1913) I L.R, 36 Mad., 108

——————*Part of a decree containing unascertained amount —Execution of whole decree three years after ascertainment—No bar—Policy of Limitation Act as to period of limitation for execution of decrees*] For the purposes of limitation regarding execution of a decree, the decree must be taken as a whole and ordinarily when a portion of the decree is not executable by reason of the fact that the amount due under that portion is left to be determined at a future time, limitation begins to run as regards execution of the whole decree only from the time of ascertainment

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MORTGAGOR, *power of, to apply for sale of mortgaged properties* —*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 92 AND 93.

MUHAMMADAN LAW—*Gift to a Mopla governed by Muhammadan Law on his marriage, not void on his wife's death or divorce—No reverter to donor*] Under the Muhammadan Law a girl when married passes over to her husband's family and there is no obligation on the members of her natural family to [illegible]

Pakrichi v. *Kunhacha* ... ... (1913) I.L.R., 36 Mad., 385

MUNICIPALITY, *sale by*:—*See* RIGHT OF SUIT.

NEGOTIABLE INSTRUMENT *in favour of A as agent of B—Endorsement by A, simpliciter to C—No* primâ facie *title in C*]: If a negotiable instrument [illegible]

[illegible] person or persons liable on the note. *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* [(1905) I.L.R., 28 Mad., 244], referred to.

Veeraiyan Chettiar v. *Ponnusuami Chettiar* ... (1913) I.L.R., 36 Mad., 302

——— ——————— *in favour of several—Discharge by one of several payees, validity of.*] *Held,* by the Full Bench (THE CHIEF JUSTICE dissenting) that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees.

Annapurnamma v. *Akkayya* ... ... (1913) I.L.R., 36 Mad., 544

NOTICE OF SUIT, *upon whom to be served.*—*See* INDIAN RAILWAYS ACT (IX OF 1890).

OATHS ACT (X OF 1873):—*See* RES JUDICATA.

ONUS:—*See* EXECUTOR, *sale by.*

ORDER, *erroneous, on a question of law, when* res judicata.—*See* LIMITATION ACT (XV OF 1877), ARTS. 178 AND 179.

PARTITION—*Consideration*—Bonâ fide *claim for separate allotment for marriages of one brother's daughters—Agreement at or before partition to allot—Execution of promissory notes by each brother for his share of the amount—Previous suit for partition*—[illegible]
Civil Procedure Code (Ac [illegible]
An agreement made bet[illegible]
was to pay money for th[illegible]
it is made before the pa[illegible]
partition or made at the t[illegible]
agreement by the father [illegible]
sufficient consideration. [illegible]
of a separate [illegible]
of marriages [illegible]
altogether un[illegible]
ment so to [illegible] the
terms of a [illegible] the
members of [illegible] the
time of partition. If an agreement so to pay a certain sum made by the other brothers at the time of partition [illegible]

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so that a suit first brought for partition against all the brothers (section 43, Civil Procedure Code, Act XIV of 1882), does not bar the institution of a subsequent suit for the sum due from one of the brothers under the promissory note. "Cause of action," meaning of, explained. *Nanu v. Raman* [(1893) I.L.R., 16 Mad., 335], *Sesha Ayyar v. Krishna Ayyangar* [(1901) I.L.R., 24 Mad., 96], *Umed Dholchand v. Pir Saheb Jiva Miya* [(1883) I.L.R., 7 Bom., 134], *Sundar Singh v. Bholu* [(1898) I.L.R., 20 All., 322] and *Moro Raghunath v. Balaji Trimbak* [(1889) I.L.R., 13 Bom., 45], followed. *Appasami v. Ramasami* [(1886) I.L.R., 9 Mad., 279] and *Shanmugam Pillai v. Syed Gulam Ghose* [(1904) I.L.R., 27 Mad., 116], distinguished. *Preonath Mukerji v. Bishnath Prasad* [(1907) I.L.R., 29 All., 256], dissented from. If several promissory notes are executed for portion of the same debt, each promissory note creates a cause of action, and this would be so even if it be assumed that a suit might be instituted for the whole debt on the original cause of action.

Anantanarayana Iyer v. Savithri Ammal ... .. (1913) I.L.R., 36 Mad., 151

PATTA, *suit to enforce acceptance of—Zamindari land converted into wet with Government water—Consideration, failure of—Enhancement—Rent Recovery Act (VIII of 1865), sec. 11.*] Certain dry Zamindari lands were converted into wet by the use of water from a channel constructed and maintained solely by Government:—*Held*, that there was no consideration for the Zamindar to levy enhanced rent notwithstanding a stipulation for enhancement, should the land be cultivated as wet. The conditions laid down in the Rent Recovery Act (Madras Act VIII of 1865), section 11, not being present the Zamindar was precluded from levying enhanced rent.

Srimatu Rajah Mallikarjuna Prasada Naidu Bahadur v. Subbayya. (1913)

I.L.R., 36 Mad., 4

PEACE, *security for keeping*:—*See* CRIMINAL PROCEDURE CODE, (ACT V OF 1898), SEC. 107

PENALTY: *See* CONTRACT ACT

PENSIONS ACT (XXIII OF 1871) SEC. 4—*No distinct grant of land revenue—Section 21, "no bar"—Hereditary Village Offices Act (Madras Act III of 1895)—"any claim to recover emoluments of an office," meaning of—Regulation VI of 1831—No jurisdiction for Revenue Courts to decide what are emoluments or to decree possession—Res judicata.*] Section 4 of the Pensions Act (XXIII of 1871) is a bar to a civil suit only where the Court is able to hold that there was distinct grant of the land-revenue itself, and where there is nothing to show that in the hands of Government before the grant of the *inam*, the land was treated as liable for the payment of land-revenue or that the Government intended to split up its ownership into *melvaram* ... on 4 ... suit ... *Her* ... 10 ... The words any claim to recover the emoluments of an office' in the Madras Hereditary Village Offices Act (Madras Act III of 1895), section 21 can only mean a claim to recover what in fact are the emoluments of an office or possibly what are claimed by the plaintiff to be the emoluments of an office, and cannot by any rule of construction be extended to include a claim to recover what the plaintiff denies to be the emoluments of an office but what the defendant alleges to be such emoluments. *Kesiram Narasimhulu v. Narasimhulu Patnaidu* [(1907) I.L.R., 30 Mad., 126], explained and distinguished. Under Madras Regulation VI of 1831, which was repealed by the Madras Hereditary Village Offices Act III of 1895, the revenue courts had no jurisdiction to decide what were the emoluments of an office or to declare ... trespasser. Hence neither sec- ... of 1831 is bar to the suit. ... I.L.R., 13 Mad., 41], referred ... VI of 1831 cannot operate ... nds in a civil court.

Secretary of State v. Subbarayudu ... ... (1913) I.L.R., 36 Mad., 553

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might entertain of his guilt, or however great might be their reluctance to interfere with or overrule the decisions of the Indian Courts in criminal matters, the conviction should not be allowed to stand. *Held*, also that this case was not one of disturbing the verdict of the Judge of a Criminal Court in India who having seen and heard the witnesses had believed them and founded his decision on their testimony; it was the reverse of that, because in this case the Judge who saw and heard the witness upon whose evidence the conviction was mainly based, did not think this evidence so reliable that he could act upon it alone and had, therefore, ordered the discharge of the other accused implicated by it. Costs of a successful appeal were not allowed as against the Crown. *Johnson* v. *Rex* [(1904) A.C., 817 at p. 824], followed

Vaithinatha Pillai v. *King-Emperor* ... ... (1913) I.L.R., 36 Mad., 501

PROBATE AND ADMINISTRATION ACT (V of 1881), *executor under: See* EXECUTOR, *sale by.*

PROBATE OR LETTERS OF ADMINISTRATION, *sale without, validity of, See* EXECUTOR, *sale by*

PROMISE, ORAL, *failure to perform See* INDIAN EVIDENCE ACT (I OF 1872), SEC. 92.

PROMISSORY NOTE, *or acknowledgment—Deed, construction of—Unconditional undertaking and the document styled as promissory note:*] It is no doubt true that the question whether an instrument is a promissory note or not should be judged by the words used, and the instrument must contain in words an unconditional undertaking to pay a sum of money, and it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money *Held*, that the following document wherein the executant not only made an unconditional undertaking to pay but also styled it a promissory note was a promissory note and not a mere recital of a liability, and as such was not admissible in evidence for want of a proper stamp. "Promissory note executed on . . . . in favour of . . . . by . . . . In the matter of the *purchase of piece-goods by me from your shop on this date, the sum* found due by me as per patty (list) is Rs. 600 . . . . which sum I promise to you or to your order on demand with interest at 1½ per cent. To this effect . . . . " *Tirapathi Goundan* v. *Rama Reddi* [(1898) I L R., 21 Mad , 49], *Govind* v. *Balwant Rao* [(1898) I.L R., 22 Bom , 986], *Horne* v. *Redfearn* [(1838) 4 Bing. N C , 433], and *White* v. *North* [(1849) 3 Exch. Reports, 689], distinguished. *Morris* v. *Lee* (1725) 92 E.R , 439, referred to.

Karuthappa Rowthan v. *Bava Moideen Sahib* ... (1913) I.L.R., 36 Mad , 370

PROSECUTION, *sanction of.—See* PERJURY.

PROVINCIAL INSOLVENCY ACT (III of 1907), ss. 4, 5, 6, 11, 12, 14, 15, 16, 26, 43, 44, and 47—*What matters are necessary to be enquired into before adjudication—What are proper subjects of enquiry before deciding on final discharge*] Before passing an order of adjudication under the Provincial Insolvency Act, it is not for a court to decide whether the debts stated in the petition for insolvency are real, whether the petitioner has not concealed any property of his from his list of assets or whether he is unable to pay his debts and similar questions. All these are properly subjects that ought to be enquired into before giving a discharge. The only things that are necessary to be decided before adjudication are whether the creditor or debtor is entitled to present the petition, whether the required notices have been served and whether the debtor has committed the alleged act of insolvency. *Per curiam.*—Section 14 (2) provides that "the court shall also examine the debtor if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing and the creditors have the right to question the debtor thereon." There is no doubt that both these clauses require that the acts referred to therein should be done. But it does not follow that every matter which forms the subject of the examination of the debtor should be decided before an

order of adjudication is made. The scheme of Act III of 1907 is to make an order of adjudication at first and then to make a full enquiry into all matters connected with the insolvency before the final discharge is decided The court has power to refuse to make an order not only on non-compliance of matters stated in section 14 (1) but also on other grounds (*e.g.*) prevention of abuse of process of the court, unnecessary harassing of a debtor by the creditor *Per* SUNDARA AYYAR, J.—The object of the provision for examination in section 14 (2) is, as in England, to obtain information at as early a stage as possible of the property and the whole conduct of the debtor in their relations to the insolvency proceedings *Udai Chand Maiti* v. *Ram Kumar Khara* (1910) 15 C.W.N., 213, *Girwardhari* v. *Jai Narain* (1910) I.L.R., 32 All, 645, and *Nathu* v. *The District Judge of Benares* (1910) I.L.R., 32 All., 547, disapproved. Various sections of the Act and of the English Bankruptcy Act, considered.

Jeer v. *Rengasami* ... ... (1913) I.L.R., 36 Mad., 402

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. I, ART. 13—*Land cess—Suit by zamindar against inamdar for recovery of, is a suit of a small cause nature*] A suit by a zamindar for the recovery of land cess from the inamdar is not exempted from the cognizance of the Provincial Small Cause Courts Act, by virtue of article 13, schedule I.

Sri Maharajah of Vizianagram v. *Veeranna* ... (1913) I.L.R., 36 Mad., 18

————— *Suit for cest, local cess, etc.*—See MADRAS ESTATES LAND ACT (I of 1908), ss 3, 53, 189 AND SCH. A, ART. 8.

REDEMPTION, *by reversioners after foreclosure*:—*See* "MORTGAGE"

REGISTRATION ACT (III OF 1877), SEC. 17, *cl.* (1)—*See* "RES JUDICATA." 46

REGISTRATION, *compulsory*:—*See* RES JUDICATA.

REGULATION XXV OF 1802:—*See* "IMPARTIBLE ZAMINDARI."

REGULATION VI OF 1831:—*See* "PENSIONS ACT (XXIII OF 1871)."

RENT, *when ascertained and payable*.—*See* "LIMITATION ACT (IX OF 1908), SCH. II, ART. 110

RENT RECOVERY ACT (MADRAS ACT VIII OF 1865), ss. 9 AND 10:—*See* LIMITATION ACT (IX OF 1908), SCH II, ART 110

————— , *sec* 11 :—*See* PATTA

RENT, SUIT FOR PRIVATE LANDS—*Madras Estates Land Act* (*I of* 1908), ss 3 (10), 19 *and* 189] A revenue court has no jurisdiction to try a suit for rent of private lands as defined in section 3 (10) of the Madras Estates Land Act (I of 1908); such a suit must be brought in a civil court

Sri Raja Appa Rao Bahadur v. *Naganna* ... (1913) I.L.R., 36 Mad., 7

RES JUDICATA—*Compromise decree—Compromise also affecting land not in suit—Registration Act* (*III of* 1877), *sec.* 17, *cl.* (1)—*Compulsory registration*]: Where a compromise affected land not in suit and a decree was passed in terms of the compromise in so far as it related to the property sued for, to render the compromise available as a defence to a future suit as regards property not formerly sued for, it must have been registered in accordance with the provisions of the Registration Act (III of 1877), section 17. If any portion of a *razinama* has not passed into a decree or order of [illegible] ings [illegible] ig it [illegible] Act [illegible] C.)] [illegible] C)], [illegible] 02], [illegible] 34 Calc., 150], distinguished.

Chelamanna v. *Rama Rao* ... ... (1913) I.L.R., 36 Mad., 46

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[illegible] estoppe[illegible]
[illegible] on the appl[illegible]
depend upon the appl[illegible]
Civil Procedure Code, doc[illegible]
The suit was for a declaration
for India, was not entitled to le[illegible]
the plaintiffs claimed as part of their
against plaintiffs once for a declaration
sion of the lands, the judgments were in [illegible]
plaintiffs in the present suit cannot be permitte[illegible]
present defendant that they were the owners a[illegible]
not maintainable. *Semble*: Even if the previou[illegible]
favour of the present plaintiffs, the Government,
entitled to question the plaintiff's title, would not
land as exempt from revenue.

Ramamurti Dhora v. Secretary of State for India

——— *Transfer of property in consideration of tra*[illegible] *third parties—Failure of transferee to pay in reasonable* [illegible] *feror to sue for sums irrespective of damage*:] A transfer in consideration of B agreeing to pay certain sums to [illegible] himself entitled to sue B for the recovery of those sums w[illegible] to him in case of B's failure to pay the third persons w[illegible] time, and A is not in such a case bound to show that h[illegible] damnified by B's failure. *Dorasinga Tevar v. Arunachal*[illegible] I L R., 23 Mad, 441]. *Ranganadham Pantulu v. Appal*[illegible] [illegible] No. 119 of 1908] and *Gopala Aiyar v. R*[illegible] [illegible] 183 of 1907], followed. *Siva Subr*[illegible] [illegible] (1911) 21 M.L.J., 359

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——————Decision based on oath, etc, effect of—Oaths Act (X of 1873), effect of]: An adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication res-judicata in a subsequent litigation between the same parties where the subject matter of the suit is different The decision of any matter directly and substantially in issue in a former suit between the same parties would none the less be res judicata because the decision was based on the oath of one of the parties or a witness in the former suit The effect is similar to that of a decision of a court based on a finding of an arbitrator or on a compromise between the parties In all these cases the decision is the decision of the court and not of the arbitrator or the parties

Sanyasi Bariya v. Artaswaro ... ... (1913) I L R, 36 Mad, 287

RESUMPTION *by a landowner against ryots, suit for* See MADRAS ESTATES LANDS ACT (I OF 1908), SEC 4

RETRIAL:—*See* EVIDENCE ACT (I OF 1872), SS 21 AND 81

REVENUE COURTS, *no jurisdiction for, to decide what are emoluments or to decree possession*: *See* PENSIONS ACT (XXIII OF 1871), SEC. 4.

REVENUE, GOVERNMENT, *due on land*:—*See* CHARGE.

REVERSAL OR MODIFICATION IN REVISION, EFFECT OF—*See* LIMITATION ACT (IX OF 1908) 135

REVERSIONERS, *redemption by, after foreclosure decree*—*See* "MORTGAGE"

——————, *right of several, independent*—*See* LIMITATION ACT (IX OF 1908), SEC 6, ART. 125

RIGHT OF SUIT—*Acquisition of inam land by Government for municipal purposes. Madras District Municipalities Act (IV of 1884), sec 279, effect of—Sale by Municipality—Imposition by Government of ground-rent on occupier—Ground-rent, liability to pay—G O. No 210 of 20th February 1889, effect of—Exemption from ground-rent to be express*:] Even an inam land which is subject only to a quit-rent becomes when acquired by Government under the Land Acquisition Act, ordinary Government land liable to assessment
in the hands of any person who might afterwards ... (1901) I L.R 25 Bom.,
whether deriving his title directly from the Gover
pality which after such acquisition by the C
under section 279 of the Madras District M .. (1913) I L.R, 36 Mad., 215
by payment of the amount settled a
by the Government and not by the **[R]EVENUE,** *owner alone can bring. Suit*
inamdar's right to exemption fro[m] *favour of A*:—*See* RIGHT OF SUIT.
pality. A transferee from th
claim as against the Gove **ACCOUNT**:—*See* LIMITATION ACT (XV OF 1877),
who claims exemption fro
ment may fix must show [LA]NDLORD AND TENANT.
the ordinary assessment
exemption in express wo[rds] **[IRRI]GATION TANK**—*Fish, offence of theft of, dependent*
1889, permitting Munic[ipality] ... *leave the tank*: Although the capture of fish in an
sale, mortgage or other ... will not of itself amount to theft, yet if the water
assessment that might ... low as to prevent the fish leaving the tank the offence
to the transfer on the *Subba Reddi v. Munshoor Ali Saheb* [(1901) I.L.R.,
...ned.

Hanumanlu v See ... as .. .. (1913) I.L R, 36 Mad, 472

—————— M

Municipal Co ... **[PRO]PERTY** *in consideration of transferee paying sums to third*
36 of Electi ... RIGHT OF SUIT.
by electi
declar ... **[TRANSFER] OF PROPERTY ACT** (IV OF 1882)—*See* MORTGAGE.

pa ——————*sec. 53*—*Mortgage in fraud of creditors, validity of*: A, being in insolvent circumstances, mortgag certain

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THE

INDIAN LAW REPORTS.

Madras Series.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling

K. P A. D'COUTHA AND ANOTHER (DEFENDANTS), PETITIONERS, 1911. February 24.

v.

J P ASSAN KUNHU (PLAINTIFF), RESPONDENT *

Private International Law—Jurisdiction—Power of Foreign Court to sell debt which has arisen in British India—Lex loci rei sitae.

Where a pledge of movable property or of a debt is allowed by the law of the territory where the transaction took place, the court of that territory has jurisdiction to sell the property in execution of its decree so as to pass a valid title to it, even if the property is situate outside its jurisdiction.

Ghamshâmlâl v. *Bhânâli*, [(1881) I.L.R, 5 Bom, 249], distinguished.

PETITION under section 115, Civil Procedure Code (Act V of 1908), praying the High Court to revise the decree of L. G. MOORE, the Acting District Judge of South Malabar, dated the 16th day of August 1909, in Appeal Suit No. 307 of 1909, presented against the decree of P. S. VELAYUDAM, the District Munsif of Tangasseri, in Original Suit No. 10 of 1908

The facts are as follow.—

One Marian George (Joseph) and his son Variad George (Joseph) both of Tangasseri started in 1894-95 an "auction *kuri*" with 45 tickets, the value of each ticket being Rs. 50. One Kunjan Matheru of Quilon—a town in the Native State of Travancore adjoining Tangasseri—was a subscriber to half a ticket. In June 1895, while the *kuri* was in progress, Matheru had to raise a loan of Rs. 217 and odd by hypothecating his rights in the *kuri* together with a landed property to one M. Velayudhan of Quilon to

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* Civil Revision Petition No. 790 of 1909.

ABDUR RAHIM AND AYLING, JJ. — D'COUTHA v. ASSAN KUNHU.

whom he also made over the receipt obtained for the amount of subscription paid by him. The *panayom* deed (Exhibit L) was registered in Quilon. Matheru having made default in paying the amount under Exhibit L, Velayudhan brought suit No. 966 of 1897-98 on the file of the Quilon Munsif and obtained a decree for sale of the mortgaged property including his (Matheru's) rights in the *kuri* which, according to the receipt, was Rs 225. In execution of this decree Matheru's interest in the *kuri* was sold by the Quilon court and purchased by the present plaintiff for Rs. 85 and odd on 17th October, 1898. A notice was subsequently issued by the court prohibiting Matheru, the subscriber, from receiving the amount and the foremen from making payment thereof to any person except the purchaser, *i e*, the present plaintiff. As Matheru was a defaulting subscriber, plaintiff had to wait till the termination of the *kuri* which was in 1904-05. Both the foremen having died before the conclusion of the *kuri*, the *kuri* was finally conducted by Liza D'Coutha, the wife of the second foreman, till its termination. The plaintiff in his capacity as purchaser of Matheru's rights in the *kuri* brought suit No. 129 of 1904-05 in the Quilon court for the recovery of the amount with interest. The suit was dismissed by the Court for want of jurisdiction. He therefore brought this suit against the present defendants—the first being the second husband of Liza and the second his son by her, Liza having died during the progress of the suit (Original Suit No.129 of 1904-5)

P. Kundu Panicker for petitioners.

V. Visvanadha Sastri for respondent

JUDGMENT.—What happened in this case was that the respondent, a subject of the Travancore Government, to whom one Matheru, also a subject of the Travancore Government, had mortgaged his rights under a *kuri* which he held against the petitioner, an inhabitant of this presidency, enforced his mortgage and bought his judgment-debtor's interest in the chit in a sale held by the Travancore Court in pursuance of the mortgage-decree. It is contended that the sale by the Travancore Court of Matheru's interest in the chit was opposed to the principles of Private International Law and therefore void For this position *Ghamshāmlāl* v. *Bhānsāli*(1) is cited as an authority. There the learned

(1) (1891) I.L.R, 5 Bom, 219.

Judges held that a court of British India had no jurisdiction to attach in execution of a decree of a British Indian court a debt which was due from a person, subject of a Native State, to the judgment-debtor, a subject of British India. That case may be distinguished from this case on the ground that here there is no *question of realizing in execution of a decree, property which is* situate in a foreign territory. The plaintiff in the present case instituted his suit in the very territory where, according to the petitioner himself, the property is situate, *i.e.*, in the Malabar district. No doubt SARGENT, J., bases his decision on a general proposition which, if understood in its widest application, might cover this case, viz., that an attachment of a debt due from a subject of a foreign territory would "be virtually an attempt to interfere in the interest of a third person in the jural relations arising out of a cause of action over which, *ex hypothesi*, no court in British India has or even claims jurisdiction." But the observation must be understood with reference to the nature of the process provided by particular sections of the Civil Procedure Code for attachment of a debt. However that may be, we fail to understand why, if as it is conceded, there is no principle of International Law which prevents a pledge of movable property or of a debt, supposing it is allowed by the law of the territory where the transaction took place, the court of that territory should be unable to sell the property in execution of its decree so as to pass a valid title to it, if the property is situate out of its jurisdiction. We may observe that the *kuri* receipt was in Travancore at the time of its pledge. The case *In re Missouri Steamship Co.*(1), cited in "Dicey's Conflict of Laws," page 24 (2nd edition), seems to us to be clearly in support of the view we have suggested. See also *North-Western Bank* v. *Poynter, Son, and Macdonalds*(2). The objection taken by the petitioner to the judgment of the Lower Court fails and the petition is dismissed with costs.

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(1) (1889) 42 Ch D. (C.A.), 321. (2) (1895) A.C., 56.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Ayling.

1911. March 13 and 14.

SRIMATU RAJAH Y. MALLIKARJUNA PRASADA NAIDU BAHADUR (PLAINTIFF), APPELLANT IN ALL THE SECOND APPEALS,

v.

V. SUBBAYYA AND ANOTHER, MINOR SONS OF V. JANAKI-RAMAYYA (DECEASED), BY MOTHER AND GUARDIAN SUBBAMMA (LEGAL REPRESENTATIVES OF THE DEFENDANT), RESPONDENTS IN SECOND APPEAL No 954 OF 1908.

M. CHINNA SUBBANNA AND OTHERS (DEFENDANTS), RESPONDENTS IN SECOND APPEALS NOS. 955 AND 957 TO 966 OF 1908.*

Patta, suit to enforce acceptance of—Zamindari land converted into wet with Government water—Consideration, failure of—Enhancement—Rent Recovery Act (VIII of 1865), section 11.

Certain dry zamindari lands were converted into wet by the use of water from a channel constructed and maintained solely by Government.

Held that there was no consideration for the zamindar to levy enhanced rent notwithstanding a stipulation for enhancement, should the land be cultivated as wet. The conditions laid down in the Rent Recovery Act (Madras Act VIII of 1865), section 11, not being present, the zamindar was precluded from enhancing the rent.

SECOND APPEALS presented against the decrees of A. L. HANNAY, the Acting District Judge of Kistna, in Appeal Suits Nos. 269, 270, 272, 273, 274, 275, 276, 277, 278, 279, 280 and 281 of 1906, respectively, presented against the decisions of P. NAGESA RAO Pantulu, the Deputy Collector, Bander Division, in Summary Suits Nos. 228, 230, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241 and 242 of 1905, respectively.

The facts of this case are sufficiently set out in the judgment

C. V. Anantakrishna Ayyar for appellant.

T. Prakasam for respondents.

JUDGMENT.—The suits are brought to enforce acceptance of pattas which were tendered by the plaintiff to his tenants. The main contention is as to the rate of Rs. 3-3-0 per acre which is

* Second Appeals Nos 954, 955, 957, 958, 959, 960, 961, 962, 963, 964, 965 and 966 of 1908.

entered in the pattas as payable on dry lands converted into wet by means of Kistna water.

SANKARAN NAIR AND AYLING, JJ.

SRIMATU RAJAH MALLIKARJUNA PRASADA NAIDU BAHADUR v. SUBBAYYA.

The Judge has found that till fasli 1278 the village was entirely under dry cultivation and the sharing system was in force. In fasli 1279 the money rent system was introduced and it was agreed between the parties that the ryots were to pay a rent of Rs. 27-4-0 per *khatti*, and in the event of the ryots cultivating dry lands with wet crops by means of Kistna water without the zamindar's permission they were to pay Rs. 100 per *khatti*.

The pattas produced by the zamindar for fasli 1300 contain this stipulation and they also state that the right of cultivation should be relinquished if the lands are cultivated without such permission Following the decision in *Appa Rau* v *Ratnam*(1), the Judge has expressed his opinion that this stipulation was penal and unreasonable It was the plaintiff's case that the question of the settlement of wet rates, if cultivation of wet crops was effected by means of Kistna water, was reserved until such cultivation actually began. The Judge has held that the plaintiff has failed to prove such reservation. In 1897, the ryots executed muchilikas for five years in which they agreed to pay Rs. 3-3-0 per acre for *bapat* wet lands, *i.e.*, for dry lands cultivated with wet crops not only for the period of five years but also subsequent to it. The wet crops are raised with the aid of water from Kistna channel constructed and maintained solely by Government and it is contended that therefore there is no consideration for this agreement. The Judge has upheld this contention. It is argued by the appellant's pleader that this was an adjustment of disputes between the parties. But it is found as a fact by the Judge that there were no disputes, and Exhibit IV series which, it is alleged, prove that there were disputes only show, as pointed out by the Judge, that these lands were not to be cultivated without the permission of the zamindar. We are therefore unable to agree with the appellant's pleader that this rate was agreed upon to avoid future disputes. It is then contended that the landlord is entitled to revert to the sharing system, and the parties could properly agree to a fixed rate for the future in lieu of a fluctuating *varam*. There is however nothing to show that the plaintiff is entitled to claim *varam* in the absence of this

(1) (1890) I.L.R., 13 Mad., 249 at p 253.

SANKARAN NAIR AND AYLING, JJ.

SRIMATU RAJAH MALLIKARJUNA PRASADA NAIDU BAHADUR v. SUBBAYYA.

stipulation. We have already stated that the reservation at the time of the agreement of fasli 1279 has not been proved, nor is it proved that the rent of Rs. 27-4-0 was to be payable only when the land was cultivated with dry crops. It has been repeatedly held that the proviso to section 11 of the Rent Recovery Act precludes the zamindar from enhancing the rent except under the conditions laid down by that section. *See Venkatagiri Rājā* v. *Pitchana*(1), *Fischer* v. *Kamakshi Pillai*(2), *Gopalasami Chettiar* v. *Fischer*(3), *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(4), *Suppa Pillai* v. *Nagayasami Thumbichi Naicker*(5), and *Paramasawmi* v. *Pusala Thevan*(6), and if any rent under the sharing system is in effect higher than the money rent now being paid by the defendant it would, in our opinion, be clearly an enhancement of rent under section 11 of the Rent Recovery Act. Mr. Anantakrishna Aiyar contends that the landlord has by this agreement precluded himself from applying to enhance the rent under that section. It is enough to say that neither of the conditions which give him a right to apply exists in this case; the improvement was not made by the landlord, and he has not been required to make any additional payment to Government; there is no such right in him to apply which he has given up. There was thus no obligation on the part of the tenant to pay any higher rent. Any agreement to pay such rent is unsupported by any consideration and is therefore not enforceable. As to the cases cited *Suppa Pillai* v. *Nagayasami Thumbichi Naicker*(5) is a case where money assessment was substituted for *varam* and a provision that the tenant must pay an increased rate for certain cultivation may not be an enhancement, if it was in the power of the landlord to claim the higher rent in *varam* in the absence of such stipulation. In Second Appeals Nos. 1121 to 1125 of 1908 the learned Judges held that the plaintiff was entitled to revert to *varam*, and the agreement to pay the money-rent in lieu of that *varam* was therefore upheld. A contract may be enforceable, as pointed out in that case, though the effect of it may amount to an enhancement of rent without the Collector's sanction. But a contract involves consideration and there was consideration as

(1) (1886) I.L.R., 9 Mad., 27.
(2) (1898) I.L.R., 21 Mad., 136 at p. 137.
(3) (1905) I.L.R., 28 Mad., 328.
(4) (1905) I.L.R., 28 Mad., 444.
(5) (1908) I.L.R., 31 Mad., 19 at p. 21.
(6) (1910) 20 M.L.J., 142.

above pointed out in that case. In these cases there is no consideration. We therefore dismiss the Second Appeals with costs.

APPELLATE CIVIL.

Before Mr. Justice Ayling.

1911. April 12 and 20.

SRI RAJA V. N. APPA RAO BAHADUR (PLAINTIFF), PETITIONER (IN BOTH),

v.

P. NAGANNA (DEFENDANT), RESPONDENT IN CIVIL REVISION PETITION No. 358 OF 1910

AND

P. GANNIAH (DEFENDANT), RESPONDENT IN CIVIL REVISION PETITION No. 359 OF 1910.*

Rent, suit for private lands—Madras Estates Land Act (I of 1908), ss. 3 (10), 19 and 189.

A revenue court has no jurisdiction to try a suit for rent of private lands as defined in section 3 (10) of the Madras Estates Land Act (I of 1908); such a suit must be brought in a civil court.

PETITIONS under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the orders, dated the 19th day of April, 1910, of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Small Cause Suit Nos. 139 and 140 of 1910.

Dr. *S. Swaminathan* for petitioner (in both).

T. Prakasam for respondent in Civil Revision Petition No. 358 of 1910, and for respondent in Civil Revision Petition No. 359 of 1910.

JUDGMENT.—These are suits for rent of private lands as defined in section 3 (10) of the Madras Estates Land Act, 1908; and the only question is whether they are cognizable by a revenue or by a civil court. The exact scope and meaning of section 19 of the Act are not altogether free from doubt; but it appears to me that in the absence of any provision corresponding to section 134 it

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* Civil Revision Petitions Nos. 358 and 359 of 1910.

AYLING, J. must be held to bar the application of section 189, under which jurisdiction is vested in the revenue courts.

SRI RAJA APPA RAO BAHADUR v. NAGANNA.

The Subordinate Judge will restore the plaints to file and dispose of them according to law. Costs will follow the result.

APPELLATE CIVIL.

Before the Chief Justice Sir Charles Arnold White and Mr. Justice Munro

1911. April 27.

SUBBAYYAR (PLAINTIFF) APPELLANT,

v.

MONIEM SUBRAMANIA AYYAR AND THREE OTHERS (SECOND DEFENDANT AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT), RESPONDENTS.*

Indian Evidence Act (I of 1872), s. 92—Sale of land, consideration for, not as stated in the deed—Oral promise, failure to perform.

Assuming that it may be shown by oral evidence that the real consideration for a deed of sale was not the consideration stated in the deed itself but a promise to maintain the plaintiff, in the absence of coercion, undue influence, fraud or misrepresentation of any kind at the time when the deed of sale was registered and possession taken thereunder, the deed will not be set aside. The special equitable doctrine whereby the American Courts have relieved in cases where an aged person has conveyed all his property in consideration of an oral promise to be supported for the remainder of his life by the grantee, not applied.

SECOND APPEAL presented against the decree of K. C. MANAVEDAN RAJA, the District Judge of North Arcot, in Appeal Suit No. 335 of 1907, presented against the decree of T. KRISHNASWAMI NAIDU, the District Munsif, Arni, in Original Suit No. 47 of 1906.

The facts of this case are stated in the judgment.

Messrs. *C. P. Ramaswami Ayyar* and *C. K. Mahadeva Ayyar* for appellant.

V. Ryru Nambiar for first respondent.

T. V. Ramanuja Rau for third and fourth respondents.

The CHIEF JUSTICE—In this suit the plaintiff asked that a certain deed of sale might be set aside. The deed of sale (Exhibit

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* Second Appeal No. 1231 of 1909

I) was executed between the plaintiff and the first defendant's husband.

The deed was registered, delivery of the deed was given to the first defendant's husband and the second defendant is now in possession under his purchase from the first defendant. The consideration recited in the deed is Rs. 300.

The case for the plaintiff is that the real consideration for the deed was a promise by the first defendant's husband that he would maintain the plaintiff who, we are told, was an old man when the deed was executed, for the rest of his life.

The learned District Judge considered the question whether under section 92 of the Indian Evidence Act, oral evidence was admissible for the purpose of showing what was the real consideration for this deed of sale. The learned judge came to the conclusion that such evidence was not admissible. For the purpose of considering the question whether the plaintiff is entitled to get this deed set aside, I assume that it is open to the plaintiff to show by oral evidence that the real consideration for the deed of sale was not the consideration stated in the deed itself, but the promise to maintain the plaintiff. I am of opinion that the plaintiff is not entitled to have this deed set aside. It is not found or alleged that there was coercion, undue influence, fraud or misrepresentation of any kind at the time when the deed of sale was registered and possession taken thereunder. That being so, the title to the property in question under section 54 of the Transfer of Property Act passed to the party to whom the conveyance was executed. I do not know that that is contested. If it is necessary to cite authorities in support of that proposition, I might refer to the decision in *Sagaji* v. *Namdev*(1), *Baijnath Singh* v. *Paltu*(2) and the decision of this court reported in *Govindammal* v. *Gopalachariar*(3). As regards the case last mentioned, the learned judges did not decide the first point whether a suit would lie in the circumstances of that case by the party who executed the sale deed to get it set aside. But it is an authority that the transfer of ownership of land by sale is effected on the execution and registration of the conveyance even though the price be not paid, so I think I may say that where the title passes on failure of consideration or on failure to pay the agreed purchase money the

(1) (1899) I.L.R., 23 Bom., 525. (2) (1908) I.L.R., 30 All., 125. (3) (1906) 16 M.L.J., 524.

WHITE, C.J., AND MUNRO, J. — SUBBAYYAR v. MONIEM SUBRAMANIA AYYAR.

remedy of the vendor is not to have the deed of sale set aside, but to recover the purchase money.

Then the question is, are we to apply a different principle to a case of this character where the real consideration, as we assume for the purpose of this judgment, is not payment of money but maintenance of the party conveying for his life.

The learned vakil for the appellant has been unable to call our attention to any English or Indian authority in which this distinction has received recognition. He has, however, called our attention to the law in America which is to be found laid down in Pomeroy's Equity Jurisprudence, Volume VI (Equitable Remedies, Volume II), paragraph 686. The learned author there, after referring to the general rule that "the mere failure by a grantee to perform a promise, which formed the whole or part of the consideration inducing an executed conveyance, gives rise to no right of rescission in the grantor", says: "This rule has been found to work a great hardship in the frequent cases where an aged person has conveyed all his property to a son or other relative on the consideration, often oral, that the grantee shall support and care for the grantor, during the remainder of the grantor's life, and the grantee, while retaining the land has abandoned the performance of his obligation." No doubt this special equity in these special circumstances has been recognized by the courts of America. I know of no English cases where this special equity has been recognized and I know of no Indian case; and in the complete absence of authority I do not think that we ought to import into the law of this country this very special rule of equity which certain American courts have applied. I think we must apply the law as laid down by the decisions of our own courts and applying that law—though possibly the case may be a hard one—I think it is not possible to come to any other conclusion than that the suit was rightly dismissed. It is not necessary to discuss the other points raised and I think we must dismiss the appeal with costs.

MUNRO, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

V S MUTHU KRISHNA AYYAR (PLAINTIFF), APPELLANT (IN BOTH), 1911. April 21 and 27.

v.

SOMALINGA MUNINAGANDRIEN AND TWO OTHERS (DEFENDANTS) RESPONDENTS IN BOTH *

Easements of light and air—Damages for infringement of light and air—Injunction, when to be granted.

A mandatory injunction will be granted to remove an obstruction of an easement to light and air where the character of the obstruction is such that its consequence is to darken the plaintiff's house so as to make it uncomfortable and in part useless In such a case damages would not be an adequate remedy.

SECOND APPEAL against the order and decree of F. H. HAMNETT, the District Judge of Madura, in Appeal Suit No. 144 of 1909, presented against the decree of N A. SRINIVASACHARLU, the additional District Munsif of Madura, in Ordinary Suit No. 12 of 1908 (O.S. No 180 of 1906 on the file of the District Munsif of Madura).

The facts of this case are stated in the judgment.

T. V. Muthukrishna Aiyar for appellant.

C. V. Ananthakrishna Aiyar for respondents.

JUDGMENT.—The plaintiff and the defendants are occupants of neighbouring houses. The suit is for a mandatory injunction that the defendants do pull down the tiled building recently erected by them on a vacant portion of their premises which, according to the plaintiff, blocked up the passage of light and air passing through four windows on his wall.

The defendants deny the plaintiff's right to the passage of light and air through all the windows and his right to the mandatory injunction claimed.

The District Munsif found that the plaintiff's right to the passage of light through the four windows was established; but curiously enough, he held that the plaintiff was not entitled to the passage of air through them. He said "I do not think that this

* Second Appeals Nos. 1563 and 1564 of 1909.

BENSON AND SUNDARA AYYAR, JJ.

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MUTHU KRISHNA AYYAR v. SOMALINGA MUNI-NAGANDRIEN.

tiled portion has inconvenienced the plaintiff by making his house ill-ventilated although it has darkened it." He refused to grant the mandatory injunction asked for and ordered that "the defendants do open in the roof of the tiled building . . . four sky-lights . . . two feet long and one and a half feet broad against windows 1 to 4, so as to allow enough quantity of light to fall into the plaintiff's house through the said windows."

On appeal, the District Judge was of opinion that the plaintiff had not established the right claimed by him with respect to window No 4 but had proved his right to the passage of both light and air through windows Nos. 1, 2 and 3, but he was of opinion that a satisfactory case for the issue of an injunction had not been made out. His reasons are (1) "The issue of an injunction will prevent the defendants from using his own land for building on and building sites are valuable in the locality where the parties reside; (2) the plaintiff can arrange to get light and air to his rooms by the construction of suitable sky-lights and ventilators or by the construction of rooms upstairs. If the former course is adopted, he will be sufficiently compensated if he is given the cost of the construction of ventilators and sky-lights. If the latter course is adopted, the compensation will be the cost of the construction of the upstair rooms less the value of the downstair rooms, which can still be used as godowns or store rooms." After appointing a commissioner to make a local enquiry and to prepare an estimate as to the cost which would be incurred, the District Judge gave the plaintiff a decree for Rs. 100 damages the amount of the difference between the cost of the construction of the upstair room and the value of the downstair room, the plaintiff having objected that the erection of sky-lights and ventilators would prevent his building an upstair room.

The plaintiff appeals against this judgment; he attacks the finding of the judge negativing his right with respect to window No. 4 and also contends that a mandatory injunction should have been granted to him. The defendants have preferred a memorandum of objections in which they deny the plaintiff's right altogether and their vakil has argued that in case the plaintiff's right be upheld and the course pursued by the District Judge to protect his right be considered inappropriate, the District Munsif's direction that the defendants do put up sky-lights in their new building should be restored. The learned judge's decision is

based on the authority of *Kalliandas* v. *Tulsidas*(1) where PARSONS and RANADE, JJ. upheld the judgment of the lower court in that case, refusing injunction to the plaintiff and awarding only damages, although the plaintiff's right to light and air was obstructed by the defendants' building. The ground on which the refusal of injunction was justified is not, however, elucidated in that case, the learned Judges merely observing: "The District Judge has given good and sufficient reasons for not granting an injunction on the present case." The reason given by the District Judge was that the injury caused by the obstruction was not so "large, material and substantial" as to entitle the plaintiff to an injunction. That judgment is not an authority which can sustain the view taken in the lower appellate court in this case. The *quantum* of the injury caused to the plaintiff was taken as the test there. The finding in this case is that the obstruction caused by the defendants' building has darkened the plaintiff's house. The case of *Kalliandas* v. *Tulsidas*(1) is no authority for the position that injunction can be refused on the ground that the plaintiff may remedy the mischief caused by the obstruction by making structural alterations with respect to his own building.

Mr. Ananthakrishna Ayyar for the respondents contends that in India an injunction is a remedy which can be granted only in exceptional cases and that the award of damages is the relief to which the plaintiff is generally entitled. We are by no means prepared to accede to this contention or to agree that there is any difference between the Law in England and in India, as observed in *Boyson* v. *Deane*(2), *Dhunjibhoy Cowasji Umrigar* v. *Lisboa*(3) and *Sultan Nawaz Jung* v *Rustomji Nanabhoy*(4) with respect to the granting of an injunction in cases of obstruction of the easement to light and air See *Ramanjulu Naidu* v. *Aparanji Ammal*(5) and *Esa Abbas Sait* v. *Jacob Haroon Sait*(6). But we do not consider it necessary in this case to decide this general question, as it is not contended that the nature of the injury is so immaterial that compensation by award of damages will be an adequate remedy unless it can be held that though the injury itself is so serious as to make his building practically useless to

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(1) (1899) I.L.R., 23 Bom., 786
(2) (1899) I.L.R., 22 Mad., 251.
(3) (1889) I.L.R., 13 Bom., 252.
(4) (1896) I.L.R., 20 Bom., 704.
(5) (1911) 21 M.L.J. (Rep.), 313.
(6) (1910) I.L.R., 33 Mad., 327.

BENSON AND SUNDARA AYYAR, JJ.

MUTHU KRISHNA AYYAR v. SOMALINGA MUNI-NAGANDRIER.

the plaintiff in its present condition, still the plaintiff can be required to make alterations which would remove the injury. The character of the obstruction is such that its consequence is to darken the plaintiff's house so as to make it uncomfortable and in part useless and therefore damages would not be an adequate compensation. Our attention has not been drawn to any authority for the position that the possibility of making alterations in the plaintiff's building so as to provide fresh sources of light and air would entitle the defendant to resist the granting of an injunction. To permit him to raise such a defence would be to allow him to take advantage of his own wrong and to compel other persons to change their own buildings to suit his convenience. A similar argument was rejected by FLETCHER, J., in *Ananth Nath Deb* v. *Galstaun*(1). There it was contended that the plaintiff could, by making internal alterations, improve the light coming thereto and that an injunction should not therefore be granted, the learned Judge characterising the argument as irrelevant and citing the following observation of Lord DAVEY in *Colls* v. *Home and Colonial Stores, Limited*(2). "The mode in which he (the plaintiff) finds it convenient to arrange the internal structure of his tenement, does not affect the question." In "Kerr on Injunctions," fourth edition, page 143, it is stated: "Nor is it any answer to say, if a man's ancient lights be interrupted that there are remedies which he can provide for himself by making changes in his own house."

Mr. Ananthakrishna Ayyar's suggestion that the District Munsif's direction that the defendants might be permitted to put up sky-lights in their own building for the benefit of the plaintiff's house might be adopted, is equally objectionable. The plaintiff cannot be asked to give up his ancient lights because the defendant is willing to provide fresh lights for him in another way. In *Dent* v. *Auction Mart Company*(3), Sir W. PAGE WOOD, Vice-Chancellor, dealing with a similar argument observed at page 251: "Then, lastly, there was the suggestion of glazed tiles—often made and never listened to by the court. A person who wishes to preserve his light has no power to compel his neighbour to preserve the tiles, or a mirror which might be better, or to keep them clean, nor has he covenants for these purposes that will run with the land,

(1) (1908) I.L.R., 35, Calc., 661 at p. 671.
(2) (1904) L.R. A.C. 179 at p. 204.
(3) (1866) L.R., 2 Equity, 238.

or affect persons who take without notice; and, therefore, it is quite preposterous to say, "Let us damage you, provided we apply such and such a remedy" Therefore, the defendant properly stands upon his own right, and declines to rely upon the degree of consideration which his neighbour may from time to time show towards him. The question comes simply back to this: "Is there substantially an interference with comfort? Is there a substantial diminution of light for carrying on work?" We might observe, besides, that the Munsif's decree does not provide for the plaintiff's right to air but only to light.

Mr Ananthakrishna Aiyar further contends that the injunction asked for should not be granted as it would inflict a greater injury on the defendants than the benefit it would confer on the plaintiff. There is nothing to show that this would be so as a fact. But assuming it to be, it is in our opinion, no answer to the plaintiff's claim. A party causing an injury to another cannot object to appropriate relief being granted to his opponent, on the ground that he would suffer serious injury by being compelled to undo his own mischief The cases where the relative conveniences of the parties may be balanced are succinctly stated thus in "High on Injunctions," section 865, page 824: "When the alleged nuisance consists in a diminution of light and air to plaintiff's building but no serious or irreparable injury is shown, the court may balance the relative inconvenience to the parties which would result from its interference and may refuse the injunction; especially when the plaintiff's only right is as a tenant from year to year and when he has already received notice to quit." The case of the *Shamnugger Jute Factory Co. Ld.* v. *Ram Narain Chatterjee*(1), relied on for the respondent was one between co-owners of the same land and the rules applicable to an injunction in such a case are not the same as in the present case.

We may observe that we are unable to agree with the Judge that there is any difference in the applicability of the law to intending builders in cities. See "Kerr on Injunctions," page 142.

We set aside the decrees of the courts below and direct that the defendants do remove the building marked G. H. T. K. in the plan attached to the munsif's decree or so much thereof as

(1) (1887) I.L.R., 14 Calc., 189.

BENSON AND SUNDARA AYYAR, JJ.

MUTHU KRISHNA AYYAR v. SOMALINGA MUNI-NAGANDRIEN

obstructs the free passage of light and air to plaintiff's windows Nos. 1, 2 and 3.

The plaintiff will have three-fourths of the costs of this litigation in all the courts

The memorandum of objections is dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911, April 27, and 28

K. DAMODARA MENON (PETITIONER),

v.

KITTAPPA MENON AND FOUR OTHERS (RESPONDENTS).*

Civil Procedure Code (Act V of 1908), Order XLVI, rule 1 and s 141—Reference in proceeding neither a suit nor appeal—Jurisdiction of High Court.

Order XLVI, Rule 1, read with section 141, Civil Procedure Code, does not authorize a reference to the High court in a matter which is neither a suit nor an appeal Section 141 does not authorize a court to invoke the jurisdiction of another court any more than it authorizes a party to do so by way of appeal. Such right must be expressly conferred by statute.

CASE stated under Order XLVI, Rule 1, Civil Procedure Code (Act V of 1908), by the District Munsif of Palghat, in Miscellaneous Petition No. 474 of 1909 (M.P. No. 666 of 1909).

The facts necessary for this case are fully set out in the judgment.

Both the parties were unrepresented.

JUDGMENT.—This is a reference made by the District Munsif of Palghat under Order XLVI, Rule 1, of the Code of Civil Procedure. The question referred is whether when mortgage money is deposited under section 83 of the Transfer of Property Act for the benefit of the mortgagee, and the mortgagee is a Malabar tarwad or tavazhi governed by the Marumakkatayam law, consisting of a mother and her minor daughters who are all made counter-petitioners to the petition put in under section 83, the minors being represented by their mother as guardian *ad litem*, the

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* Referred Case No. 5 of 1909.

money may be paid out to the mother alone as manager without taking security from her under Order 32, Rule 6, of the Code of Civil Procedure, to protect the interests of her minor daughters. The munsif is of opinion that, although the proceeding before him is not a suit or appeal, he is entitled to make this reference by virtue of the provisions of section 141 of the Code of Civil Procedure which lays down that "the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." In our opinion this reference is incompetent. It has been held in numerous cases that section 141 will not give a party to a proceeding, not a suit, a right of appeal: See *Thomas Souza* v. *Gulam Moidin Beari*(1), *Parasurama Ayyar* v. *Seshaier*(2). The corresponding provision in section 38 of Act XXIII of 1861, expressed in similar language, was interpreted by JACKSON and MILLER, JJ., to extend to other proceedings only "the mode of trial and the procedure incidental thereto" laid down in the Civil Procedure Code and not a right of appeal. See *Hureenath Koondoo* v. *Modhoo Soodun Saha*(3) followed in *Ningáppá* v. *Gangáwá*(4). We are of opinion that the section does not authorize a Court to invoke the jurisdiction of another Court, any more than it authorizes a party to do so by way of appeal. Such right must be expressly conferred by statute. See *Minakshi* v. *Subramanya*(5). We therefore decline to answer the question. The record will be returned to the munsif who will dispose of the case according to law.

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(1) (1903) I.L.R., 26 Mad., 438. (2) (1904) I.L.R., 27 Mad., 504.
(3) (1873) 19 W.R., 122. (4) (1886) I.L.R., 10 Bom., 433.
(5) (1888) I.L.R., 11 Mad., 26 [P.C.].

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. July, 31.

SRI MAHARAJAH OF VIZIANAGRAM (PLAINTIFF), APPELLANT,

v.

K. VEERANNA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Provincial Small Cause Courts Act (IX of 1887), article 13—Land Cess—Suit by zamindar against inamdar for recovery of, not a suit of a small cause nature.

A suit by a zamindar for the recovery of land cess from the inamdar is not a suit of a small cause nature within article 13 of the Provincial Small Cause Courts Act.

SECOND APPEAL against the decree of D. RAGHAVENDRA RAO, the temporary Subordinate Judge of Vizagapatam, in Appeal Suit No. 412 of 1908, presented against the decree of S. VENKATASUBBA RAO, the District Munsif of Chodavaram, in Original Suit No. 728 of 1907.

S. Srinivasa Ayyangar for appellant.

P. Nagabhushanam for respondents.

JUDGMENT.—The preliminary objection has been taken that no second appeal lies on this case as the suit is of a small cause nature. The question is whether a suit for recovery of land cess by the zamindar from the inamdar can be said to fall within article 13 of the Provincial Small Cause Courts Act. That article is in these words. "A suit to enforce payment of the allowance or fees respectively called *málikána* and *hakk*, or of cesses or other dues when the cesses or dues are payable to a person by *reason of his interest in* immoveable property or *in* an hereditary office or in a shrine or other religious institution."

Now can it be said that the land cess is payable to the zamindar by the inamdar *by reason* of the former's interest in immoveable property? We think not. The land cess is a tax levied by the Government and the landlord who in the first instance has

* Second Appeal No. 630 of 1910.

paid it to the Government is entitled to recover it from the intermediate tenure-holder because the latter as between himself and the landlord, is the person who ought to bear the burden of the tax. The cesses and dues contemplated in article 13 are payments which a person is entitled to as representing his interest in certain immoveable property and not because he possesses some interest in immoveable property. We are fortified in this conclusion by the rulings in *Zemindar of Tarla* v. *Latchiah*(1).

The preliminary objection prevailing, the second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Phillips.

1911. August 1, 2, 3.

DANAKOTI AMMAL AND ANOTHER (DEFENDANTS Nos. 1 AND 2), APPELLANTS,

v.

BALASUNDARA MUDALIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Adoption, validity of—Sapinda, consent of, obtained for consideration—Indian Evidence Act (I of 1872), section 32, sub-sections 3 and 5—admissibility of statement made by deceased person.

Where under the Hindu Law, the consent of a sapinda is required to validate an adoption by a widow and that consent is obtained in exchange for a valuable consideration the transaction will vitiate the adoption.

Rami Reddi v. *Rangamma*, [(1901) 11 M.L.J., 20], followed.

Srinivasa Ayyangar v. *Rangasami Ayyangar*, [(1907) I.L.R., 30 Mad., 450], distinguished.

A statement made by a deceased sapinda admitting that he had received a sum of money in connection with an adoption was sought to be proved in order to invalidate the adoption:

Held, that the statement was admissible under section 32, sub-section 3 of the Indian Evidence Act, it being a statement made against his pecuniary or proprietary interest:

Held also, that the statement was admissible under section 32, sub-section 5, as it related to the existence of a relationship; and this notwithstanding that the relationship was not in dispute at the time when the statement was made.

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(1) (1903) 13 M.L.J., 211 and Second Appeal No. 10 of 1907.

* Appeal No. 212 of 1907.

WHITE, C.J., AND PHILLIPS, J. — DANAKOTI AMMAL v. BALASUNDARA MUDALIAR.

APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Original Suit No. 20 of 1906, dated the 23rd day of September 1907.

The facts of this case are set out in the judgments below.

T. R. Ramachandra Aiyar for second appellant and *N. Rajagopalachari* for appellants.

C. V. Anantakrishna Aiyar for respondents.

The CHIEF JUSTICE.—This is an appeal from a decree declaring an adoption invalid and not binding on the reversioners. The plaintiffs are the reversioners. The first defendant is the widow who adopted. The second defendant is the adopted son; and the third defendant, now deceased, is the *sapinda* whose consent was essential to the validity of the alleged adoption. The appeal was argued on that assumption.

The *factum* of the adoption is not denied and the question we have to consider is, is the adoption valid in law? It is impeached on various grounds in paragraph 14 of the plaint. It is said that "the consent of the third defendant was procured corruptly and improperly by paying him a bribe of . . . one thousand rupees." It is also said that "the consent of the third defendant was further procured by representing to him falsely that the first defendant had already authority from her son."

Those are the only two grounds which were seriously argued before us and so I need not refer to the other grounds on which the plaintiffs in their plaint impeach the adoption.

The written statement of the defendants Nos. 1 and 2 denies the allegations in the plaint and says that there was no such arrangement as is set up in the plaint with reference to payment and that no payment was made. It denies that the third defendant was induced to give his consent by a false representation.

The first issue is general: "Whether the adoption of the second defendant by the first defendant is valid and binding." The second issue is "whether the adoption of the second defendant is invalid for all or any of the reasons alleged in paragraph 14 of the plaint."

There is no suggestion to be found either in the issues or in the pleadings as to the case which was sought to be made on behalf of the appellants in the argument on appeal. The case sought to be made was assuming the money to have been paid to the third defendant, the circumstances in which it was paid were

such as not to invalidate the adoption. I think it is at any rate doubtful whether having regard to the pleadings and the issues it was open to Mr. Ramachandra Aiyar to argue that case. However, perhaps it might come in under the general language of the first issue whether the adoption is valid. At any rate we allowed him to argue it and that being so, I propose to deal with it in due course.

First, as regards the findings of fact in this case—as I have said, the adoption is impeached on two grounds: first, that the consent was purchased, and secondly that it was procured by misrepresentation of fact. I take the first ground first—the alleged purchase of the consent. As to this there is a direct conflict of evidence. The consent is contained in a registered document, Exhibit I, which is dated March 29, 1901. That document contains no reference to the payment of any money, but, of course, it is not to be expected that a transaction of that sort, if it took place, would be recorded in the document. The actual deed of adoption is also registered (Exhibit II). That is dated, May 10th.

The plaintiff's first and second witnesses give a circumstantial account of the payment of a sum of Rs. 1,000 to Kandasamy, the third defendant—the party whose consent was essential to the validity of the adoption. According to their evidence, this payment was made at the time the deed of consent was written and they say, that they actually saw the money paid. There are some discrepancies in their evidence no doubt, as the learned District Judge himself points out. The Judge had an opportunity of considering their demeanour and he comes to the conclusion that they were witnesses of truth and I am not disposed to say that he was wrong in his conclusion. The testimony of these two witnesses is corroborated by certain documentary evidence. We have a notice, dated April 20th, which is Exhibit CC in the case. This is a notice from the plantiffs to the third defendant, in which they state expressly that the third defendant, with a view to defraud the plaintiffs, had received Rs. 1,000 from the natural father and the adoptive mother and had executed to the latter a deed of authority to adopt. To that notice there is a reply, dated April 25th (Exhibit DD). In this reply the third defendant states that he received Rs. 1,000 in connection with this transaction.

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Now, the third defendant, as I have said, is dead and it was argued that this statement, as a statement by a deceased person, was not admissible. No objection was taken in the court below to the admissibility of this statement and the question of its admissibility was not made one of the original grounds of appeal in the appeal to this court. A supplemental ground of appeal was lodged by the defendants. I think the statement as to the circumstances in which the third defendant received the Rs. 1,000 may be said to be a statement made against his pecuniary or proprietary interest within the first branch of sub-section 3 of section 32 of the Evidence Act. Whether it falls within the second branch of the sub-section I need not discuss. It may be that the maximum *ex turpi causa non oritur actio* would apply and that a suit for damages by a party to the transaction would not lie.

I think the statement also falls within sub-section 5 of section 32 and that it is admissible under that sub-section. The statute law of India, which is perhaps somewhat wider than the English law with regard to this matter, runs thus, " when the statement relates to the existence of any relationship." I think this statement relates to the existence of the relationship by adoption. It is true that the status of adoption had not been created at the time the statement was made, but I see no reason for restricting the language to cases of that sort as we are invited to do on behalf of the appellants Supposing the *factum* had not been admitted and the question for us to determine was, was there an adoption *in fact*, I do not think it could be argued that this statement did not relate to the existence of relationship by adoption. It seems to me it is equally admissible when it relates to a circumstance which is relied upon by one of the parties as going to show that though the adoption took place in fact it was not a valid adoption in point of law. It was contended that the statement was inadmissible under sub-section 5, because it was not made before the question in dispute was raised. I think there is nothing in that objection. The statement relates to a question of fact, namely, whether Rs. 1,000 was in fact paid to the third defendant. That statement was made by the plaintiffs It was accepted by the third defendant at the time it was made. It was not denied by anybody. True, the question which afterwards arose between the parties was a question whether in the events which happened the adoption was valid.

But I do not think that prevents the statement of fact—which is contained in Exhibit DD being one made before the question in dispute arose within the meaning of section 32, sub-section 5. I therefore think that the statement in Exhibit DD is admissible in evidence for the purpose of showing that Rs. 1,000 was received by the third defendant in connection with his consent to the adoption.

Then we have in evidence certain notices which were sent the day before the adoption was made. They are Exhibits B and C. B is a notice from the plaintiffs to the first defendant. There the payment of the Rs. 1,000 is alleged There is a similar notice from the plaintiffs to the natural father of the second defendant, which also alleges payment of Rs. 1,000 to the third defendant It was suggested in reply that the terms of the letters were such that one would not expect an answer to be given. The fact that no answer was sent may not be very strong evidence, but it is evidence which to some extent at any rate corroborates the oral testimony which the Judge believed. Then there is another document in evidence and that is an account (Exhibit T). That is an account which purports to be an account kept by the third defendant of his dealings with the natural father of the second defendant. The first item is "Cash received in the matter of adoption, Rs. 1,000." It is under date March 29, which is the date of the registered deed of consent. It is said on behalf of the appellants that this account was written up at a subsequent period and consequently was not evidence under section 32. The circumstances in which this account was made out appears from the evidence of the fifth witness for the plaintiffs (page 99). He speaking of the third defendant says: "He used to ask me to enter payments made to him on slips of paper. He could write, but his hand was shaky as he was old. Once he asked me to enter them all in a book. I did so. Exhibit T is that book. The whole of it is in my writing." So Exhibit T is clearly not the statement as made by a deceased person, but an account made up from statements made by him contemporaneously, I think it may be taken, with the dates affixed to the various entries and subsequently reduced to the form of an account by this fifth witness for the plaintiffs. The "slips of paper" are not in evidence but we have the evidence of the witness that the slips were copied into the account. There may be some doubt as to whether Exhibit T is admissible in evidence under

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section 32. But, even assuming it is not admissible under section 32, there is, it seems to me, abundant evidence to justify the findings of the District Judge that the payments were, in fact, made.

On behalf of the defendants, various witnesses were called, who denied that payment of the money was made. These witnesses the Judge disbelieved.

I do not think it is necessary to discuss certain evidence which was adduced with reference to money lending transaction on the part of the third defendant. It was sought to show in support of the plaintiff's case that the money lending transactions were of a character which were beyond the means of the third defendant unless he had special funds to fall back upon; and it was suggested that Rs. 1,000 supplied these funds. On the other hand, it was argued that he had, independently of any alleged payment of the Rs 1,000 to him, funds wherewith to carry on the transactions. I need not discuss the evidence as to that because, as I have said, I think that the District Judge was right in his conclusion, on the direct evidence, with reference to this transaction.

I think it is established that the plaintiffs proved that the consent of the third defendant to the adoption was purchased by the payment of a sum of money and that the District Judge's finding of fact with regard to this was right.

Then, as regards the alleged misrepresentation, there is a recital in Exhibit I, which is a document giving consent, executed to the first defendant by the third defendant, stating "In the will executed by your son prior to his death, permission is given to you *to adopt a son.*" *The first witness for the plaintiffs and also the* second witness for the plaintiffs speak to a statement to this effect having been made to the third defendant when he was asked to give his consent and the Judge believed them. I see no reason to differ from his conclusion as regards this. There is also evidence that the will (Exhibit I) is not genuine, and if it is established that the will is not genuine, the statement of fact in Exhibit I in a sense, at any rate, is a false statement. We have in Exhibit EE, which is the judgment in certain litigation before a District Judge, a finding that the will was "quite unreliable." Then we have the evidence of the first witness for the defence, who in cross-examination said "I wrote the will. The court held it to be not

genuine"; as to that, there was no re-examination. Therefore, we have the evidence that the statement was made and evidence that the statement was in a sense, false.

I do not propose to consider whether this, standing alone, would be sufficient to vitiate the adoption—that is to say, whether, on this misrepresentation alone, the case would fall within the principle of the decision in *Subrahmanyam* v. *Venkamma*(1) which was affirmed by the Privy Council in *Venkamma* v. *Subramaniam*(2).

The only other question which remains for consideration is the question of law which was raised in the manner stated at the beginning of this judgment. The question which has been argued is, "does a payment to a party, whose consent is essential for the validity of an adoption invalidate the adoption?" Mr. Anantakrishna Aiyar submitted the proposition that any money payment (or I suppose any valuable consideration) given in order to procure the assent and accepted as a consideration for the consent would vitiate the consent because it would prevent the party who was entrusted with the duty of consenting or of declining to consent from exercising a *bonâ fide* independent judgment in the matter.

I am not prepared to say that this proposition is too broadly stated. It seems to me in accordance with the decisions of the Privy Council and of this court. In the well-known Rāmnād case—*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(3)—I find this statement of the law. Their Lordships were considering the question of consent by a father-in-law. With reference to that, they say: "All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the Widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question, that the consents were purchased, and not *bonâ fide* attained." It is true their Lordships were considering the transaction from the point of view of what was done by the widow rather than from the point of view of what was done by the party who received the money or the consideration and on the strength thereof gave his consent. But the language of the judgment certainly suggests an antithesis between a purchased consent and good faith, and implies that the

(1) (1903) I.L.R., 26 Mad., 627. (2) (1907) I.L.R., 30 Mad., 50 [P.C.].
(3) (1868) 12 M.I.A., 397 at p. 442

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two are irreconcilable. Then their Lordships go on, in a passage which, I think, has been described in a later judgment of the Privy Council, perhaps not very clearly stated, and which, I confess I feel some difficulty in following, in these words: "The rights of an adopted Son are not prejudiced by any unauthorised alienation by the Widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption." The phrase "adoption needed" seems to require explanation. The other reports of this case have been referred to and the same phraseology appears. Possibly, what their Lordships meant to lay down was this, that from the point of view of the widow the making of a payment by the widow did not go to the root of the legality of the adoption.

I do not think they intended to suggest that the receipt of a gift by the party entrusted with the duty either of giving or withholding his consent did not go to the root of the legality of an adoption.

Then in *Vellanki Venkata Krishna Rāo* v. *Venkatarāma Lakshmi*(1) which was a decision of the Privy Council on the question of the validity of an adoption their Lordships in discussing the question of motive, make these observations: "Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." The reference to the "family council" seems inconsistent with the argument put forward on behalf of the appellants that this consent could be purchased. Then we have the Berhampur case reported in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(2).

(1) (1876) I.L.R., 1 Mad., 174 at pp. 190 and 191.
(2) (1876) I.L.R., 1 Mad., 69 at p. 82.

There we find a passage in the judgment of their Lordships which is of importance with reference to the question of discretion. "It is admitted on all hands that an authorisation by some kinsman of the husband is required. To authorise an act implies the exercise of some discretion whether the act ought, or ought not, to be done. In the present case there is no trace of such an exercise of discretion." So far as I can see, in the case now before us, there is no trace, of an exercise of discretion. The consent apparently was given, because certain parties were willing to pay Rs. 1,000 for the purpose of procuring the same. Then there is another case which has an important bearing on this question and that is the case of *Rami Reddi* v. *Rangamma*(1). There Mr. Justice BASHYAM AYYANGAR declined to argue that in the circumstances in which the consent was given in that case, the adoption was valid. The circumstances apparently were that the party whose consent was required took a gift from the widow, who adopted, in the shape of land which formed part of the estate of her deceased husband. It may possibly be that the head-note to the case which simply says: "The consent of a sapinda given for a consideration received is not sufficient to support an adoption," is too wide, having regard to the actual facts in that case. Then we have a decision of SUBRAMANIA AYYAR and MOORE, JJ., in *Venkatakrishnamma* v. *Annapurnamma*(2), the question raised in that case being whether the consent of every *sapinda* was necessary. There their Lordships observe: "It would seem only reasonable to say that when a *sapinda* refuses to assent but withholds his grounds for such refusal, he must be held to be precluded from relying on the refusal as in any way affecting the adoption. The propriety of this view will be clearer still if we remember the reason of the rule which compels a widow, desirous of making an adoption but possessing no authority from her husband in regard to it, to obtain the assent of his sapindas. The reason is the presumed incapacity of a woman for independent action in such a matter. And as the position of the sapindas in cases like this is, according to the Judicial Committee, similar to that of a family council that has to decide upon the expediency of substituting an heir by adoption to the deceased husband on a

(1) (1901) 11 M.L.J., 20.
(2) (1900) I.L.R., 13 Mad., 486 at p. 489.

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fair consideration of the question [*Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narasayya*(1)] a *sapinda* who, like the appellant, refuses to give his reasons for the opinion why such an heir should not be substituted while other sapindas decide otherwise, cannot be held to exercise properly the discretion confided to him." It is to be observed that it is not the discretion "vested in" him but discretion confided "to" him which indicates that the discretion to be exercised is, I do not say, that of a trustee, but partaking to some extent, of the nature of the discretion which a trustee is called upon to exercise.

There is another case, *Murugappa Chetti* v. *Nagappa Chetti*(2)—another decision by SUBRAMANIA AYYAR, J., sitting with SANKARAN NAIR, J. There the Court held that the receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. With regard to the point we are now considering we find this passage "It is scarcely necessary to say that a gift or acceptance from motives of a questionable character by a person competent of his own choice to give or accept is distinguishable from the case of acceptance by a widow acting under the authority of a sapinda given for corrupt consideration. In the latter case the adoption fails because of the absence of *bonâ fide* authority to take, such authority being an essential constituent of a good adoption by a widow not empowered by her husband to make one." The decision which is reported in *Srinivasa Ayyangar* v. *Rangasami Ayyangar*(3) is distinguishable on the ground that the party who gave the consent did not get any thing for himself but merely protected himself from the loss which he would have incurred if he had not been able to make special arrangements in connection with the adoption. That case, I think, is clearly distinguishable from *Rami Reddi* v. *Rangamma*(4), and I do not think it conflicts with the general proposition which Mr. Anantakrishna Ayyar submitted.

I do not think it is necessary for me to consider the question whether any distinction is to be drawn between a case where, as

(1) (1876) L.R., 4 I.A., 1 at p. 14. (2) (1900) I.L.R., 29 Mad., 161 at p. 164.
(3) (1907) I.L.R., 30 Mad., 450. (4) (1901) 11 M.L.J., 20.

in *Rami Reddi* v. *Rangamma*(1) the money comes from the estate of the deceased husband of the widow and a case where the money is forthcoming from some independent source, because as I have said, I am prepared to hold that the proposition which has been stated is a correct exposition of the Hindu Law with regard to this matter.

I think the decree of the District Judge was right and that this appeal should be dismissed with costs.

PHILLIPS, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar.

J. CHINA PITCHIAH (THIRD DEFENDANT), APPELLANT,

1911. August 10.

v.

T. PEDAKOTIAH AND THREE OTHERS (PLAINTIFF AND DEFENDANTS FIRST AND SECOND), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 53—Mortgage in fraud of creditors, validity of.

A, being in insolvent circumstances, mortgaged certain property to *B*, there having been a failure in payment of part of the consideration money. *C* holding a money decree against *A*, impeached the mortgage as fraudulent.

Held, that the fact that the mortgage was for an amount larger than was really paid, was no reason for not upholding it to the extent that it was supported by a debt existing at the date of the mortgage and that *A* was entitled to a decree for the amount actually paid by him

Chidambaram Chettiar v. *Sami Aiyar*, [(1907) I.L.R., 30 Mad., 6], distinguished.

Ishan Chunder Das Sarkar v. *Bishu Sardar*, [(1897) I.L.R., 24 Calc., 825], followed.

SECOND APPEAL [under Order XLI, Rule 11 of the Code of Civil Procedure (Act V of 1908)], presented against the decree of A. N. ANANTARAMA AIYAR, the Temporary Subordinate Judge of Guntūr, in Appeal No. 241 of 1907, against the decree of P. C. TIRUVENKATACHARLU, the District Munsif of Ongole, in Original Suit No. 160 of 1906.

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(1) (1901) 11, M. L. J. 20

* Second Appeal No. 272 of 1911.

SUNDARA AYYAR, J.

CHINA PITCHIAH v. PEDAKOTIAH.

The facts of this case are sufficiently set out in the judgment.

P. Nagabhushanam for appellant.

None appeared for respondents.

JUDGMENT.—This is a suit by the plaintiff to recover the amount due on a mortgage bond, executed to him by the first defendant by the sale of the mortgaged property. The question raised in the second appeal is whether the third defendant, who obtained a decree against the first defendant for money, is entitled to impeach the mortgage as altogether fraudulent and unenforceable. The finding of the Lower Appellate Court is that the mortgage was supported by consideration only to the extent of Rs. 1,055-5-6 and that the remainder of the consideration recited in the bond was not paid. The appellate court gave plaintiff a decree for the amount which was actually paid and held the mortgage not to be valid for the remainder of the amount. The Subordinate Judge observes in his judgment that at the time of the mortgage the first defendant was unable to pay his debts in full. Mr. Nagabhushanam for the third-defendant appellant contends that, a portion of the consideration for the mortgage bond being fictitious the whole document ought to be considered to be fraudulent, against the creditors of the first defendant including the third defendant I am unable to agree with this proposition. A mortgage in so far as it is executed for the purpose of paying off a debt really due by the mortgagor could not defeat the creditors of the mortgagor. No doubt, the mortgage would give preference for the debt due to the mortgagee. But such preference does not come within the mischief of section 53 of the Transfer of Property Act. It is difficult to see how a charge created for discharging a real debt can be taken to be one defeating the creditors of the debtor as a body. To the extent, therefore, that the mortgage bond was supported by a debt actually due prior to the date of the instrument, it must, in my opinion, be upheld. I am far from laying down a proposition to the effect that it is enough for every kind of alienee to prove that his transaction is supported by consideration to shew that it is not within the mischief of section 53 of the Transfer of Property Act. In the case of a sale adequate consideration might pass from the vendee to the vendor, but the object might still be to defeat the creditors of the vendor by converting his immoveable property into cash which he would be able to use for his own purpose and to put the

SUNDARA AYYAR, J.

CHINAI PITCHIAH v. PEDAKOTIAH.

property previously available to his creditors practically beyond their reach. It is also possible that a mortgage giving a term of enjoyment of the mortgaged properties to the mortgagee might be fraudulent as against creditors though supported by consideration partially. Again a sale supported by consideration might be regarded as invalid against creditors if the consideration be utterly inadequate. The debtor might be actuated by the malicious desire of defeating his creditors partially by selling his property for a low price. The present case, however, does not come within any of these classes of cases. The plaintiff's claim is only that of a simple mortgagee and his suit is simply to recover his money. The fact that the mortgage is for an amount larger than he really paid can be no reason for not upholding it to the extent that it is supported by a debt existing at the date of the mortgage. Mr. Nagabhushanam has referred me to a case reported in *Chidambaram Chettiar* v. *Sami Aiyar*(1), but I am of opinion that case does not support him, though it does affirm the proposition that where a debtor attempts to screen his property from his creditors by converting the nature of his property so as to make it practically unavailable to his creditors the transaction would be one prohibited by section 53 of the Transfer of Property Act. An examination of the case in *Ishan Chunder Das Sarkar* v. *Bishu Sardar*(2) shows that this is the real principle underlying the cases which lay down that a transaction may be wholly invalid where a part of the consideration is fictitious. I must reject this second appeal.

Mr. Nagabhushanam says that though the judgment of the Lower Appellate Court allows proportionate costs to both sides, the decree does not carry out this direction and that there is an error in it. This matter may be rectified by an application made for the purpose. The rejection of this second appeal will be without prejudice to any steps that the appellant may be advised to take for that purpose.

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(1) (1907) I.L.R., 30 Mad., 6. (2) (1897) I.L.R., 24 Calc., 825.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. September 1, 6.

O. P. GOVINDA TARAGAN (PETITIONER), APPELLANT,

v.

VEERAN AND SEVEN OTHERS (DEFENDANTS Nos. 2 TO 9), RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 92, 93—Power of mortgagor to apply for sale of mortgaged properties

In a suit for redemption of a mortgage (the mortgage not being a simple mortgage or a mortgage by way of conditional sale), where the mortgagor fails to pay the mortgage amount according to the decree he may apply for sale of the mortgaged properties. Paragraph 2 of section 93, Transfer of Property Act, while giving the defendant mortgagee a right to apply for sale does not take away such right from the plaintiff mortgagor.

APPEAL against the decree of L. G. MOORE, the Acting District Judge of South Malabar, in Appeal No. 68 of 1910, dated 16th March 1910, presented against the order of T. K. SUBBAIER, the District Munsif of Wallavanad, in Execution Petition No. 650 of 1909 in Original Suit No. 214 of 1906.

In this case the appellant was the plaintiff in a redemption suit and obtained a decree for redemption on 23rd November 1906, with time six months The decree was confirmed in appeal by M. Mundappa Bangera, the Subordinate Judge, on 20th March 1907, and time for redemption extended to 20th September 1907. On 1st December 1909, the plaintiff being unable to pay the decree amount applied for sale of the properties. The defendants pleaded that the right and authority to make a request for the sale of the property belonged to them alone. The munsif in dismissing the application, observed:—"Order 34, Rule 8 of the Civil Procedure Code, contemplates only applications by the defendant (mortgagee). Even under the Transfer of Property Act (IV of 1882) the application by the defendant and not by the plaintiff in a redemption suit was contemplated to get an order absolute for sale. The petitioner's pleader relied upon an observation made in the first paragraph of page 315 in *Vedapuratti* v. *Vallabha*

* Appeal Against Appellate Order No. 60 of 1910.

SUNDARA AYYAR AND AYLING, JJ.

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Valiya Raja(1) and contended that the petitioner has a *locus standi* to present this application and get an order for sale. The decree that is sought to be executed was passed under section 92 of the Transfer of Property Act. It was only a decree for redemption as far as plaintiff the mortgagor is concerned though provision is made in it for sale or foreclosure in case of non-payment within the time prescribed, of the mortgage money by the plaintiff. Such provision is only to accrue to the benefit of the mortgagee defendant who would otherwise be driven to a separate suit for getting a direction for sale. The direction in the penultimate paragraph of section 93 that on the passing of such an order on the application of the defendant the plaintiff's right to redeem and the security shall both be extinguished shows that the mortgagor (plaintiff) must either redeem the mortgage or allow his redemption right to be extinguished, under the redemption decree. No other right is allowed to the mortgagor. In the case of decree for sale in a suit by the mortgagee the plaintiff might get a decree against other properties of the mortgagor and against him personally under section 90 of the Transfer of Property Act when the net proceeds of the sale are not sufficient to pay the decreed amount. There is no such provision made in the redemption decrees and it is doubtful whether in such a case the defendant can apply for such supplemental decree or order except by a separate suit. As the section 93 of the Transfer of Property Act and the Order XXXIV, Rule 8, do not contemplate an application by the plaintiff in a redemption suit to get an order for sale, I hold that the petitioner is not entitled to make the present application. A mortgagor who comes with a suit for redemption must be presumed to be ready with the money or to be able to raise the money to get back the mortgaged properties himself by paying the mortgage amount. He cannot use the court as a means of selling his properties." On appeal L. G. MOORE, the acting District Judge, agreed with the conclusions of the munsif.

The plaintiff appealed to the High Court.

P. Kundu Panicker for appellant.

A. Nilakanta Aiyar for respondents.

JUDGMENT.—This second appeal relates to the execution of the decree in Original Suit No. 214 of 1906 in the District Munsif's Court of Wallavanad confirmed on appeal by the

(1) (1902) I.L.R., 25 Mad., 300 at p. 315.

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District Court of Calicut. The decree in the suit which was to redeem a *kanom* demise granted by the plaintiff to the defendants ran in these terms: "This court doth order and decree that upon payment by the plaintiff into court to the credit of the defendants Nos. 1 and 2 within six months from this date of the *kanom* amount Rs. 28-9-2 and value of improvements Rs. 157-13-0 less arrears of revenue Rs. 6-7-1, court costs Rs. 17-9-8 and future rent from 1082 at 20 paras of paddy worth As. 8 a para and As. 4-7 a year until execution of the decree, the defendants do deliver up to the plaintiff or to such person as he may appoint in his behalf all documents in their possession or power relating to the plaint mortgaged property and described in the schedule hereunto annexed and do retransfer the same to the plaintiff free from the mortgage and from all encumbrance created by the defendants or by any person claiming under them and put the plaintiff into possession of the same and that in default of payment of the amount due as aforesaid on or before the date specified as above the said mortgaged property or a sufficient portion thereof be sold and the proceeds of such sale after defraying thereout the expenses of the sale, be paid into court and applied in payment of the amount due as aforesaid and the balance if any be paid to the plaintiff or other person entitled to receive it." The decree was thus in accordance with section 92 of the Transfer of Property Act which directs that in a suit for redemption the court shall, in case of non-payment of the redemption money within the time fixed, order a sale unless the mortgage be by conditional sale. The plaintiff-mortgagor did not deposit the money due according to the decree within the time fixed. He afterwards applied to the court in execution for an order directing the sale of the mortgaged property. Both the lower courts have dismissed the petition holding that under section 93 of the Transfer of Property Act, only the mortgagee, and not the mortgagor, is entitled to apply for an order for the sale of the property if the mortgagor does not make payment of the redemption amount as provided by the decree. The decree-holder has preferred this second appeal.

It is contended before us that the mortgagor is also entitled in the circumstances narrated above to apply for an order directing the sale of the mortgaged property. The case has to be decided according to the provisions of the Transfer of Property Act the

decree having been passed while the provisions of that Act with respect to mortgagee decrees were in force. There is not much judicial authority on the question which we have to decide. In *Vedapuratti* v. *Vallabha Valiya Raja*(1) there is a dictum of Sir V. BHASHYAM AYYANGAR, J., in the appellant's favour. The learned Judge observed: "Notwithstanding that section 93, Transfer of Property Act, deals only with a mortgagee's application for an order for sale, it would on principle seem that there could be no objection to the mortgagor applying for the execution of the decree under section 92 and obtaining an order for the sale of the mortgaged property, the sale of which has been decreed under the last paragraph of section 92, in case payment is not made on or before the date fixed in the decree for redemption." The appellant's pleader cites the opinions of Dr. R. B. Ghose and Messrs Sheppard and Brown in their commentaries on the Transfer of Property Act, in opposition to this dictum. In *Vallabha Valiya Raja* v. *Vedapuratti*(2) it appears to have been assumed by PARKER, J., at page 47 and SHEPPARD, J., that the mortgagee alone could apply for sale where a decree directing a sale has been passed under section 92 of the Act in a suit for redemption. But the question did not arise for decision in that case.

On a careful examination of the provisions of the Act, we have come to the conclusion that the dictum of Sir V. BHASHYAM AYYANGAR, J., is right and that we should follow it. Section 92 makes it imperative on the court to pass a decree for sale in every suit for redemption unless the mortgage be by conditional sale. A decree for foreclosure can be passed only in the case of conditional mortgages and English mortgages The intention of the statute appears clearly to be that there should be no foreclosure in the case of simple and usufructuary mortgages. Although the plaintiff's right to redeem is conditional upon his paying the amount due by him under the mortgage he is not to be foreclosed if he does not fulfil the condition and the consequence of his not fulfilling it is that the property should be sold. The ordinary rule in the case of conditional decrees is, no doubt, that where a person who has obtained a judgment upon condition does not perform or comply with such condition he should be considered to have waived or abandoned the judgment (see Order XLII,

(1) (1902) I.L.R., 25 Mad., 300 at p. 315 (2) (1896) I.L.R., 19 Mad., 40 at p. 49.

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Rule 2 of the English Judicature Act). But this rule cannot be applied to decrees for redemption under the Transfer of Property Act, as the legislature has expressly provided that the result of the non-fulfilment of the condition is to be something else, namely, that the mortgaged property is to be sold. In England formerly a sale could not be directed in an action by the mortgagor for redemption (see the Chancery Amendment Act, 15 & 16 Vict., chapter 86, section 48). But section 85 of the Conveyancing Act, 1881, entitles the mortgagor to an order for sale in an action brought by him, either for redemption alone, or for sale alone, or for sale or redemption in the alternative. When a sale is not ordered a decree for redemption would include a clause dismissing the suit on the plaintiff's failure to pay the mortgage amount to the defendant within the time fixed, see *Harmer* v. *Priestley*(1); Seton on 'Decrees,' volume II, 1040, No. 11, 4th edition. Such a dismissal of the action would operate as a decree for foreclosure because the mortgagor cannot afterwards file another bill for the same purpose. See *Marshall* v. *Shrewsbury*(2). *Cholmley* v. *Countess Dowager of Oxford*(3), *Parker* v. *Housefield*(4) and " Pemberton on Judgments " 422. The Transfer of Property Act has deliberately omitted to provide that a suit for redemption should be dismissed where the mortgagor fails to pay the mortgage amount and expressly lays down that foreclosure is to be confined to cases of mortgage by conditional sale. The mortgagor's right of redemption can be destroyed only by a final order of foreclosure or sale: (see proviso to sections 60 and 87, also section 89). It could not have been intended that when he fails to pay the redemption amount the relationship of mortgagor and mortgagee should perpetually continue, unless the mortgagee should choose to apply for sale.

It has now been held by this court agreeing with the Bombay High Court and reversing the former current of decisions, that after obtaining a decree for redemption the mortgagor cannot institute a second suit for the same purpose [*Vedapuratti* v. *Vallabha Valiya Raja*(5)], although the Allahabad High Court, altering its own former view is now of opinion that a second suit for redemption is maintainable. See *Sita Ram* v. *Madho Lal*(6).

(1) (1853) 16 Beavan, 569. (2) (1875) L.R., 10 Ch., 250.
(3) (1741) 2 Atkyns, 267; Inman Wearing 3 De. G. and S., 729.
(4) 39 E.R. Ch [(1834) 2 My. and K., 419 (8 C.); (1834) 4 J. Ch. (N.S.), 67].
(5) (1902) I.L.R., 25 Mad., 300 at p. 310 (6) (1902) I.L.R., 24 All., 44 at p. 53.

There is, therefore, no way by which a mortgagor who has failed to deposit the mortgage money within the time fixed could enforce his right of redemption except by making an application for sale. As the decree directs that the property shall be sold there is no reason on principle why the plaintiff should not be entitled to apply to the court for the enforcement of the direction.

Mr. Vythianadha Aiyar for the respondents lays stress on the language of the second paragraph of section 93 that the defendant may apply for an order that the mortgaged property be sold, and it is apparently this language that has influenced the opinions of the learned commentators on whom he relies. But it appears to us that the language was intended to indicate that though the plaintiff in the suit is the mortgagor and he would ordinarily be understood to be the decree-holder, the mortgagee, defendant is also entitled to apply for an order for sale In section 88 which deals with suits for foreclosure it is provided that either the plaintiff, *i.e.*, the mortgagee, or the defendant, *i.e.*, the mortgagor may ask that a decree for sale should be passed in lieu of a decree for foreclosure. And section 89 provides that either the plaintiff or the defendant may apply for an order absolute for sale in case the mortgagor fails to pay the mortgage amount.

It is further contended that while the English Conveyancing Act expressly authorizes the mortgagor in a redemption suit to ask for a decree for sale, the Indian Act does not do so, and that it is to be inferred from this difference between the two Acts that a mortgagor suing for redemption is not intended in India to have a right to apply for sale at any stage of the proceedings. But this difference does not affect the decision of the question before us. Mortgages in India, except the class called English mortgages are not regarded as similar, in all respects, to mortgages in England. With respect to English mortgages, section 88 as already pointed out, entitles a mortgagor to ask for sale when the mortgagee institutes a suit for foreclosure. The reason why no alternative provision for sale or foreclosure is made in section 92 is that the Indian law goes further than the English law and provides that except in the case of mortgages by conditional sale and English mortgages there shall be a decree for sale only and not for foreclosure or dismissal of the suit, in the case of all suits for redemption. The result is that in the case of simple and usufructuary mortgages the mortgagor need not ask for an alternative decree

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for sale as the court can pass only a decree for sale in case of non-redemption, that in the case of English mortgages a decree for foreclosure will be passed in favour of the defendant mortgagee in redemption suits and the mortgagor has apparently no right to ask for a decree for sale instead, and that in foreclosure suits where the mortgage is an English mortgage the mortgagor—defendant may ask for a decree for sale in lieu of one for foreclosure but that he cannot do so where the mortgage is one by conditional sale. It is difficult to believe that the sale being the only course open where the mortgagor does not pay the mortgage-amount, the mortgagor was intended not to be entitled to apply for it as much as the mortgagee. In some cases the provision for sale may be as much for the benefit of the mortgagor as for the benefit of the mortgagee. So long as the mortgage subsists, which as already pointed out, it would, unless the mortgagee obtains an order absolute for sale, the mortgagor may not be able to dispose of his property by sale to third parties. While if the property be sold by the court he would be entitled to the sale-proceeds after discharging the charges on the property. Where the decree is imperative there is no reason why the decree should not be regarded as passed for the benefit of all the parties to the suit. Nor is there any reason for holding that any of the parties to the suit who would be benefited by the sale cannot apply for the enforcement of the decree. We ought perhaps to observe that an Order XXXIV, Rule 5, in the present Civil Procedure Code, corresponding to section 89 of the Transfer of Property Act, the provision is that in case of non-payment by the mortgagor, the court shall "on application made in that behalf *by the plaintiff*" pass an order absolute for sale, although rule 4 (2) enacts that a decree for sale may be passed at the instance of the mortgagor is as well as of the mortgagee. It is difficult to say that it was intended that the mortgagor who can get a decree for sale passed cannot apply for the execution of such a decree. It is however unnecessary to consider this question further.

We are of opinion for the foregoing reasons, that the orders of the lower courts dismissing the plaintiff's application, cannot be supported and we reverse those orders and remand the execution petition to the Court of First Instance for disposal according to law. The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

K. SOMAKKA (PETITIONER IN CIVIL REVISION PETITION No 245 OF 1910), APPELLANT,

1911. October 9 November 7.

v.

K. P. RAMIAH (PETITIONER IN CIVIL REVISION PETITION No. 245 OF 1910), RESPONDENT.*

Guardian and Wards Act (VIII of 1890)—Jurisdiction of District Court—No power to order payment of money for minor's marriage by person not guardian—Concurrent jurisdictions—When order passed under one jurisdiction can be taken to be passed under another.

The Guardian and Wards Act (VIII of 1890) does not give the District Court any power or authority over persons other than the guardian or the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian, or whether a particular guardian should be removed or not and for the purpose of restoring the ward to the custody of the guardian.

Under the Guardian and Wards Act no order can be passed directing a person not a guardian, to pay a sum of money for the purposes of a minor's marriage. Where a judge passing such an order under the Guardian and Wards Act, could have passed a similar order as a judge of a court of ordinary civil jurisdiction, the order cannot be treated as a decree in a suit. The two jurisdictions are wholly distinct though exercisable by the same official.

Sadasiva Pillai v. *Ramalinga Pillai*, [(1875) 2 I A., 219], and *Ledgard* v. *Bull* [(1887) I.L.R., 9 All., 191 (P.C.)], distinguished.

APPEAL under section 115 of the Civil Procedure Code (Act V of 1908) against the order of M. GHOSE, the Acting District Judge of Cuddapah, dated the 26th November 1909, in I.A. No. 127 of 1909 (Original Petition No. 32 of 1909).

The facts of this case are sufficiently stated in the judgment.

The Hon. Mr. *L. A Govindaraghava Ayyar* for appellant.

The Hon. Mr. *T. V. Seshagiri Ayyar* for respondent.

ABDUR RAHIM, J.—In this case we are asked to revise by way of appeal or under section 115, Civil Procedure Code, an order made by the District Judge of Cuddapah upon a petition presented to him under sections 24 and 43, Guardian and Wards Act, by the guardian of a certain Hindu female minor praying for permission to give the minor in marriage to a certain

* Appeal Against Order No. 70 of 1910.

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person mentioned in the petition, and for an order directing the appellant in this appeal, who is the surviving widow of the father of the minor girl and in possession of his estate, to pay Rs. 800 for the expenses of the contemplated marriage. The appellant appeared in answer to the notice and pleaded that, under the circumstances mentioned in her counter-petition, she was not liable to make any payment, and that the proposed marriage was not suitable She took no objection to the jurisdiction of the District Court to make any order against her on the petition, and after hearing the pleaders on both sides the Court passed this order: "The petition is allowed with costs. Rs. 300 is sanctioned. Fees Rs. 5." The order having regard to the prayer in the petition has the effect of directing the counter-petitioner to pay Rs. 300 and costs to the guardian. No issues were framed and no evidence appears to have been taken and apparently none was adduced by either party.

The first question argued is that the order is bad for want of jurisdiction and must be set aside on that ground. Now there can be no doubt that so much of the order as directs the appellant to pay Rs. 300 to the petitioner for purposes of the minor's marriage is not warranted by any provision of the Guardian and Wards Act. This is conceded by Mr. Seshagiri Ayyar, who appeared for the respondent. But he contends that, as the District Court could have in a suit properly framed for the purpose passed a decree to the same effect, this order cannot be said to have been passed without jurisdiction, but at the worst there was only an irregularity in the way the court assumed jurisdiction, and, as no objection was taken to the course adopted at the time, it must be deemed to have been waived and the order cannot now be impeached for want of jurisdiction or on the ground of irregular exercise of jurisdiction. He does not however contend, and very rightly, that, if the order is without jurisdiction altogether, either waiver of objection or consent on the part of the appellant to the course followed could make the order valid. There can be no doubt that the District Court which passed the order appealed against could have in a regularly instituted suit passed a decree against the appellant to substantially the same purport. At the same time the power vested in the District Court under the Guardian and Wards Act is so totally dissimilar to its power as a court of ordinary civil jurisdiction that I think it will be going

much too far to say that an order purporting to be made under but which in fact is not warranted by the provisions of that Act can be treated as a decree passed in a suit. The two jurisdictions are wholly distinct, though exercisable by the same official. It is not a case of exercise of the same jurisdiction by different forms of procedure.

The whole scheme of the Guardian and Wards Act, generally speaking, is to entrust to the District Court the duty of looking after the welfare of the minor's person and property, and for this purpose it gives it power to appoint a guardian to have charge of the minor's person and property as the most feasible mode of discharging its duty. The guardian is really the hand of the District Court, and is to act under its advice, control and constant supervision. The Act does not profess to give the District Court any power or authority over persons other than the guardian or the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian or whether a particular guardian should be removed or not and for the purpose of restoring the ward to the custody of the guardian Otherwise the enforcement of rights or claims of the ward or against the ward is left to be regulated by ordinary proceedings by suits and the Act does not provide any machinery for deciding upon or enforcing any such claims, though so far as the guardian is concerned the District Court is vested with very wide disciplinary powers over him in order that it may enforce the orders passed against him under the Act. The jurisdiction or power conferred upon the District Court by this Act is of a very special and limited character, and the procedure prescribed under the Act, which is of a summary character, though appropriate for the determination of questions arising therein, is very different from the procedure laid down by the Civil Procedure Code for the trial of suits. That being so, can we uphold an order such as this, which purports to be made under, but is not in fact warranted by, the provisions of that Act as a decree passed in a suit? After the best consideration I have been able to give to the matter, my conclusion, as already indicated, is that the question must be answered in the negative.

In dealing with the question certain facts must be borne in mind. In the first place the order in question in this case is impeached in the course of the same proceedings by way of appeal

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and not collaterally, as when a party who has allowed a decree or order to become final impugns its validity for the first time when it is sought to be enforced in execution or wishes to reopen the question in a subsequent proceeding, treating the previous adjudication as null and void. Then this is not a case in which the parties expressly agreed that the Court should adopt the particular course alleged to be beyond its power, or where one party by his conduct has estopped himself from raising the question of validity of a particular proceeding. Here all that happened was, the appellant failed to object to the District Court dealing with the matter by proceeding under the Guardian and Wards Act. Again the District Court purported to make the order in the exercise of a jurisdiction conferred on it by a special statute very different in its nature, scope and the way in which it is to be exercised from its jurisdiction as a court of ordinary civil jurisdiction. It is not therefore a case in which a Court purports to act in the exercise of a particular jurisdiction, but adopts a form of procedure prescribed for one department of that jurisdiction rather than another.

If these facts be borne in mind, the present case is easily distinguishable from the class of cases relied on by Mr. Seshagiri Ayyar. For instance in the case of *Sadasiva Pillai* v. *Ramalinga Pillai*(1), the question was whether mesne profits which accrued after the decree and were not expressly provided for in it could be recovered from the respondents in the appeal before the judicial committee in execution or only by a separate suit. It appeared that the respondents had executed bonds to account for mesne profits after the date of the decree in accordance with an order which was objected to either in the first instance or by way of appeal, and their Lordships held that the liability to account was made "a question relating to the execution of the decree" or that at all events the respondents by their own agreement and subsequent conduct were estopped from saying that the mesne profits in question were not payable under the decree according to the principle laid down in *Pisani* v. *Attorney-General for Gibraltar*(2). On the question whether the order was without jurisdiction, they observe :—"The Court had a general jurisdiction over the subject-matter though the exercise of *that* jurisdiction by the particular proceeding may have been irregular." The Court in that case

(1) (1875) 2 I.A., 219. (2) (1874) L.R., 5 P.C., 516.

was in fact exercising its ordinary civil jurisdiction, though by means of a proceeding prescribed for the execution of decrees and not for the trial of suits. The principle thus enunciated by the Privy Council has no application therefore to this case. Nor is this a case, as I have already pointed out, of estoppel. In *Pisani* v. *Attorney-General for Gibraltar*(1), the Attorney-General had filed an information claiming for the Crown certain lands which belonged to a deceased person as escheat for want of heirs. The defendants put forward their several claims to the land, and on the motion of the Attorney-General, when he found that he failed to establish the claim of the Crown, it was agreed among all the parties that the rights of the defendants as between themselves should be declared whatever might be the event of the suit regarding the claim of the Crown. By the decree it was declared that the lands had not escheated to the Crown and that a certain will of the deceased was valid. On an appeal being preferred to the Judicial Committee from that decree, a preliminary objection was taken to the competency of the appeal on the ground that the decree, so far as it declared the rights of the defendants, must be treated as an award of an arbitrator. It was held that the agreement was binding, but the preliminary objection was overruled on the ground that, though the course adopted by consent was a deviation from the *cursus curiæ*, yet, as the parties meant to keep themselves *in curiæ* and the judge clearly so understood them, there was an appeal. The court had jurisdiction over the subject and the assumption of the duty of another tribunal was not involved in the question. They then point out that departures from ordinary practice by consent are of frequent occurrence, and that unless there is an attempt to give the court a jurisdiction which it does not possess or something occurs which is such a violent strain on its procedure that it puts it entirely out of its course, so that the court of appeal can't review the decision, such departures have never been held to deprive either of the parties of the right of appeal. Mr. Seshagiri Aiyar has not raised any question as to our power to revise the order. Then is not this a case of assumption by one tribunal of the duties of another? As I have tried to show, the powers and the duties of the District Court under the Guardian and Wards Act are wholly dissimilar to its powers and duties as a court of civil jurisdiction, and, when it

(1) (1874) L.R., 5 P.C., 516.

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acts under such special statute, it must in my opinion be regarded to be acting as a tribunal other than a tribunal of general civil jurisdiction. When, as here, the difference between the two jurisdictions is not one merely of form but of a radical nature, having regard to their scope, subject-matter, and the rules regulating their exercise, the fact that both are vested in one and the same tribunal would not make an order which is made in the exercise of one jurisdiction liable to be regarded as if it was properly made in the exercise of the other jurisdiction.

In *Ledgard* v. *Bull*(1) another judgment of the Privy Council, all that is laid down is that in a suit tried by a competent court the parties, having without objection, joined issue and gone to *trial upon the merits, cannot subsequently dispute the jurisdiction* on the ground of irregularity in the initial procedure, which if objected to at the time would have led to the dismissal of the suit. But in this case, as I view the matter, the liability of the appellant never formed the subject of trial by the District Court as a court of general civil jurisdiction. The same answer applies to the case reported in *Gurdeo Singh* v. *Chandrikah Singh*(2), in which the learned judges discuss at length the distinction between inherent absence of jurisdiction and irregular assumption of jurisdiction.

I think the proceeding in question ought also to be set aside on the ground that it is such a violent strain on the procedure that it puts it entirely out of its course, so that the court of appeal cannot review the decision. I may observe here that the course adopted by the District Court not being by agreement of the parties, there could be no question of its acting as arbitrator *so as to deprive either party of his right of appeal*. If the case had been tried as a suit under the Civil Procedure Code, it would have to be tried in the court of the District Munsif, and the parties would then have a right of successive appeals to the District Court and to the High Court. There is no authority to which our attention has been drawn which would justify us in saying that, because the appellant did not take objection to the course adopted by the District Court, he must be taken to have waived such rights of appeal as he would have had, if the matter had been properly tried as an action. If the proceeding in

(1) (1887) I.L.R., 9 All., 191 (P.C.). (2) (1909) I.L.R., 36 Calc., 193.

question were to be treated as one under the Guardian and Wards Act, there would be no appeal as it is not covered by section 47, and, if it be regarded as a decree in a suit tried by the District Court in its ordinary civil jurisdiction, then we must hold that by mere failure to object to the District Court dealing with the matter under the Guardian and Wards Act, the appellant has deprived himself of the right of second appeal, which otherwise he would have had. This I am not prepared to hold in the absence of express authority. Further if the matter had been tried as a civil action, issues would have had to be framed and there would have been a proper judgment and a decree. As it is, there are no issues, no judgment, and no decree and it is difficult to see how we can properly revise the order of the District Court on the merits.

All this shows that the proceeding of the District Court is so completely outside the ordinary course of trial of civil actions, that it must be held to be without jurisdiction. Besides even if it were possible to treat the order as a decree in an action it would be liable to be set aside on the ground that there has been no proper trial. But as I am of opinion that the order has been made without jurisdiction under the Guardian and Wards Act, it must be set aside under section 115, Criminal Procedure Code. I would therefore allow the Civil Revision Petition and set aside the order of the District Court in so far as it directs the counter-petitioner in that court to pay Rs. 300 with costs in this court and leave each party to bear his own costs in the District Court.

SPENCER, J.—Assuming that the District Judge intended his order: "The petition is allowed with costs. Rupees 300 is sanctioned. Fees Rs. 5" to be tantamount to a money decree for Rs. 300 and costs and executable as such against the respondent, I agree with my learned brother, whose judgment I have had the advantage of reading, that the order was irregular and without jurisdiction, although the question before us is not covered by authority and presents some difficulty.

In the petition presented under section 10 of the Guardian and Wards Act for the appointment of a guardian for the minor, it was stated that the property left by the minor's father devolved on his second wife, the respondent, and is in her enjoyment, and that the minor has no property whatever. It was not alleged at the hearing of the present appeal that the minor has any separate

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estate. Her step-mother has, it appears, a widow's estate and she has only an expectancy. It is possible that the District Judge in passing orders about the minor's marriage may have lost sight of the fact that there was no fund under the control of the court out of which the marriage expenses might be defrayed, and this surmise is rendered probable by the use of the word "Sanctioned" instead of "Decreed." If the minor had property of her own and if the District Judge only intended to fix the amount which in his opinion was a suitable amount to spend on the minor's marriage, there would clearly have been nothing beyond his competence in the order passed. The petition under sections 23 and 47 however contained a prayer to direct the respondent to pay Rs. 800 for marriage expenses, and both parties have construed the order as a direction to her to pay a sum of Rs. 300. Treated as such, the Guardian and Wards Act gave the Judge no power to make the order, and I agree that it should be set aside as without jurisdiction, the parties to bear their own costs in the District Court, and the respondent to bear his own and the appellants' costs in this court.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. August 1, 2 and 11.

R. P. CHELAMANNA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

R. P. RAMA RAO (PLAINTIFF), RESPONDENT.*

Res judicata—*Compromise decree—Compromise also affecting land not in suit —Registration Act (III of 1877), sec. 17, clause (b)—compulsory registration.*

Where a compromise affected land not in suit and a decree was passed in terms of the compromise in so far as it related to the property sued for, to render the compromise available as a defence to a future suit as regards property not formerly sued for, it must have been registered in accordance with the provisions of the Registration Act (III of 1877), section 17.

If any portion of a *razinama* has not passed into a decree or order of court, it is *primâ facie* difficult to see how a recital of it in the proceedings of the court

* Second Appeal No. 853 of 1910

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or its inclusion in pleadings put before the court will bring it within the operation of clause (i) of section 17 of Registration Act.

Bindesri Naik v. *Ganga Saran Sahu*, [(1898) I.L.R., 20 All., 171 (P.C.)], and *Pranal Anni* v. *Lakshmi Anni*, [(1899) I.L.R., 22 Mad., 508 (P.C.)], explained.

Natesa Chetty v *Vengu Nachiar*, [(1910) I.L.R., 33 Mad., 102], dissented from.

Jasimuddin Biswas v. *Bhuban Jelin*, [(1907) I.L.R., 34 Calc., 456], distinguished.

SECOND APPEAL against the order of A. RAGHUNADHA RAO, the Subordinate Judge of Cocanada, in Appeal Suit No. 31 of 1909, presented against the decree of V. C. MASCARENHAS, the District Munsif of Cocanada, in Original Suit No. 599 of 1907.

The facts of this case are sufficiently set out in the judgment.

P. Narayanamurty for appellants.

A. Narasna Rau for respondent.

JUDGMENT.—In this case the plaintiff's suit is for the recovery of certain lands in the possession of the defendants. Both the Lower Courts have found the plaintiff's title and possession within twelve years prior to the suit proved.

The only question in second appeal is, whether the plaintiff's claim is unsustainable in consequence of a compromise entered into between the parties in a prior suit—Original Suit No. 363 of 1904. That suit was instituted by the plaintiff against the present defendants and others for the recovery of another plot of land. The parties entered into a compromise in that suit. By the terms of that compromise it was settled *inter alia* that both the land sued for then and the lands which form the subject-matter of this suit should be divided into two moieties and that the plaintiff should take one moiety and the defendants the other moiety. The agreement of compromise was not registered under Act III of 1877. The plaintiff being then a minor, the compromise was submitted to the court under the provisions of section 462 of the then Civil Procedure Code, and the court gave leave to the plaintiff's next friend to enter into the compromise, holding it to be beneficial to the minor A decree was afterwards passed in terms of the compromise in so far as it related to the property which was then sued for. The court, of course, could not pass a decree then in respect of the properties now in suit, as they were not included in the claim then made. The plaintiff, it may be noted, attempted to get a share of the properties now sued for in execution of the decree in that suit. His attempt naturally failed as the decree did not cover these properties. Both the Lower Courts have

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held that the defendants could not rely on the compromise as a defence to this suit as it was compulsorily registrable under the provisions of section 17 of the Registration Act.

It is contended before us on behalf of the appellants that this view is wrong and reliance is placed on the decisions of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu*(1) and *Pranal Anni* v. *Lakshmi Anni*(2) and on the case of *Natesa Chetty* v. *Vengu Nachiar*(3). Several other cases were cited at the argument on both sides. As there is some conflict of judicial opinion on the point, it is desirable to refer at some length to the rulings of the Privy Council mentioned above. In *Bindesri Naik* v. *Ganga Saran Sahu*(1) the suit was to enforce the payment of money due on a mortgage bond by sale of the mortgaged property. The dispute between the parties was whether the plaintiff was entitled to recover as against the property the interest due to him on the mortgage-amount after the date fixed for payment—originally in the instrument of mortgage. The judicial committee held, on the construction of the mortgage document, that he was so entitled. The plaintiff had based his claim to *post diem* interest, also on joint petitions presented by him and by his debtors the defendants in the suit in the course of certain proceedings instituted by the plaintiff for foreclosure In these petitions the parties stated the total amount of principal and interest which was then due on mortgage The sums thus stated included *post diem* interest up to the date of the petitions. The court was asked to sanction the arrangement between the parties under section 257-A, Civil Procedure Code, and to grant an extension of time in accordance therewith for the payment of the mortgage debt. The required sanction was granted by the court. The defendants contended that the consent petitions could not be relied on by the plaintiff as they were not registered in accordance with the provisions of the Registration Act. The Privy Council observed: "Although, in the view which their Lordships take the question, whether those proceedings can be founded on, without their having been registered in terms of the Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard counsel fully upon the point, they are satisfied that the provisions of section 17 of

(1) (1898) I.L.R., 20 All., 171 (P.C.).
(2) (1899) I.L.R., 22 Mad., 508 (P.C.). (3) (1910) I.L.R., 33 Mad., 102.

the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the court." In *Pranal Anni* v. *Lakshmi Anni*(1), a suit which had been instituted for possession of certain lands was amicably settled by a compromise between the parties, which related both to those lands and to other lands which were the subject-matter of the case before the Privy Council. The *razinama* which was presented to the court in the first suit stated that the parties had agreed to take each a certain share of the land sued for. One of the four schedules incorporated with it, namely, Schedule D, related to and described the lands which were the subject of the second suit, but the body of the compromise contained no reference to it. It set forth as "remarks" that the lands in Schedule D were also to be taken in equal shares by the parties. The decree of the court awarded to the plaintiff, in terms of the *razinama*, a share of the lands then actually sued for. The question in the second suit was whether the *razinama* in the previous suit which was not registered could nevertheless be relied upon by the defendants in bar of the plaintiff's right to recover the whole of the lands The Privy Council held that it could not. Their Lordships observed, "the objection founded upon its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions in so far as they were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The *razinama*, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal who gave their consent to it. If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had

(1) (1899) I.L.R., 22 Mad., 508 at p. 513 (P.C.).

agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken either in the *razinama* or in the judicial order which gave effect to it. The *razinama* merely referred, by way of remark, to the lands now in dispute; and the Judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in Schedule *D* of the *razinama*. So far as regarded these lands, the compromise was not submitted to the learned Judge, but was deliberately left by the parties to stand upon their unregistered agreement of union."

The contention for the appellants is that in these two cases their Lordships of the Privy Council have laid down that an unregistered document requiring registration under section 17 of Act III of 1877, if referred to or narrated in a decree or order of a court or set out in pleadings filed by parties to the instrument in a court, would have the same effect as if it had been registered although it forms no part of the decree or order of the court. Now section 17 enacts that documents coming within the classes referred to in clauses (*a*) to (*d*) thereof shall be registered. Clause (i) exempts from the rule of compulsory registration "decrees and orders" of courts as an exception to clauses (*b*) and (*c*). There is no provision in the section that pleadings before a court which are mere statements of parties should be registered Section 49 of the Act lays down "No document required by section 17 to be registered, shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." It will be observed that non-registration of a compulsorily registrable document leads to two consequences: one is that it cannot be *received as evidence* of any transaction affecting *immoveable* property and the other that it shall not *affect* any *immoveable* property comprised therein. If a *razinama* has been passed into a decree or order by a court then under clause (i) of section 17 it is exempted from compulsory registration; and the decree or order would constitute the matters comprised therein *res judicata* between the parties to the litigation. But if any portion of the *razinama* has not passed into a decree or order of court, it is *primâ facie* difficult to see how a recital of it in the

proceedings of the court or its inclusion in pleadings put before the court will come within the terms of clause (i). And it is difficult to suppose that their Lordships of the Privy Council could have intended to extend the provisions of clause (i) in the manner urged by the appellants. On examination of the language employed by their Lordships, it is clear that they did not do so intend. The observation in the earlier case is that the provisions of section 17 do not apply to pleadings. This is no doubt obvious. In the latter case, the *dictum* is that the order of the Judge if it had referred to or narrated the terms of the compromise not embodied in the decree of the court, would have been judicial evidence available to the appellant that the respondents had agreed to transfer the moiety of the lands to which the reference or narration might relate. All that their Lordships meant, apparently, was that the entry of an agreement in a decree or order of court would be relevant to prove the agreement. This is laid down in section 35 of the Evidence Act. It has been held that such an entry would be primary and not secondary evidence of the facts contained in it. See *Byathamma* v. *Avulla*(1), *Thama* v. *Kondan*(2), *Parbutty Dassi* v. *Purno Chunder Singh*(3). But taking it that an agreement could be proved by means of the entry of it in an order of court this circumstance would only get rid of one of the two consequences of non-registration laid down in section 49 of the Registration Act, viz., the inadmissibility of the document in evidence. It does not, however, remove the other consequence, namely, that the document cannot *affect* the *immoveable* property comprised therein The observations of the Privy Council do not lend any countenance to the suggestion that the reference or narration in a decree or order could have any such effect. The *immoveable* property comprised in a compromise can be affected only in so far as it has passed into a decree or order of the court. If a particular transaction is not required by law to be effected by a registered instrument and if the consequence of non-registration were declared to be merely its inadmissibility in evidence then it might be possible to hold that such consequence might be avoided when the contents of the instrument are entered in judicial proceedings.

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(1) (1892) I.L.R., 15 Mad., 19 at p. 23. (2) (1892) I.L.R., 15 Mad., 378.
(3) (1883) I.L.R., 9 Calc., 586.

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It has to be remembered that, in one sense, the whole of a compromise by which a suit is terminated is put before the court for being recorded though the court will pass a decree in terms thereof only in so far as it relates to the subject-matter of the suit. When it is placed before the court with a request to record it, it becomes part of the pleadings and when the court records it, it by implication refers to the whole of the compromise. How much of the compromise would be evidence under section 35 of the Evidence Act would depend upon how much thereof could be regarded as having been entered in the record of the court. But, as already pointed out, an entry in the court's record will not enable anything not actually part of the decree or order of the court, to affect the immoveable property compromised in that order.

For these reasons, it appears to be clear that the appellants' claim to the properties now in question on account of its inclusion in the compromise is unsustainable. As for *Natesa Chetty* v. *Vengu Nachiar*(1) there is a *dictum* there in appellants' favour. The learned judges who decided the case—WALLIS and SANKARAN NAIR, JJ.—observe referring to the passage in *Pranal Anni* v. *Lakshmi Anni*(2) already set out in these records:—"In our opinion this passage clearly means that the compromise could have been enforced, although not registered, even about the lands not included in the suit. The learned judges who decided *Raghubans Mani Singh* v. *Mahabir Singh*(3), understood their Lordships' judgment in the same way." With all deference to the learned judges this *dictum* cannot be accepted as correct. It is opposed to the decisions of the court in *Muthayya* v. *Venkataratnam*(4) and *Patha Muthammal* v. *Esup Rowther*(5). The decision of the Allahabad High Court in *Raghubans Mani Singh* v. *Mahabir Singh*(3) relied on by the learned judges, has not been followed in that court itself in the later cases of *Kashi Kunbi* v. *Sumer Kunbi*(6) and *Sadar-ud-din Ahmed* v. *Chajju*(7). Our view is in accordance with the decisions of the Calcutta High Court in *Birbhadra Rath* v. *Kalpataru Panda*(8), *Kali Charan Ghosal* v. *Ram Chundra Mandal*(9), and *Gurdeo Singh* v.

[illegible]
(2) [illegible] .R., 28 All., 78.
(4) [illegible] .R., 29 Mad., 365.
(6) [illegible] .R., 31 All., 13.
(8) [illegible] .R., 30 Calc., 783.

Chandrikah Singh(1) and *Jasimuddin Biswas* v. *Bhuban Jelini*(2) was relied on in favour of the appellants. But that case is distinguishable. There, a decree was passed against the defendant for the amount agreed upon as the proper rent by an unregistered compromise. The defendant was bound to execute a *solenama* according to the terms of the compromise, agreeing to pay that rent. He remained in occupation of the plaintiffs' land, but failed to execute the *solenama*. It was held that the plaintiff was entitled to the rent fixed by the compromise. The plaintiff would be entitled to recover the amount from the defendant as for use and occupation though that was not the exact ground on which the decision was based.

The defendants in their written statement did not put forward any title to the land except under the compromise referred to above. That is therefore the only root of their title and as it is unregistered they cannot rely on it as affecting the immoveable property comprised therein.

The Second Appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

D. DEVALRAJU AND TWO OTHERS (LEGAL REPRESENTATIVES OF THE FIRST PLAINTIFF), APPELLANTS, 1911, August 4, 7, 8 and 14.

v.

MAHAMED JAFFER SAHEB (DEFENDANT), RESPONDENT.*

Landlord and tenant—Indian Evidence Act (I of 1872), sec. 116—Estoppel.

A purporting to be *dharmakarta* of a temple gave a lease of the temple properties to *B*. During the tenancy *C* and not *A* was declared, in a separate suit, to be the rightful *dharmakarta*.

B had not attorned to nor been evicted by *C*.

Held, that the tenancy had not been determined and that in a suit by *A* for rent, *B* was estopped by section 116, Indian Evidence Act, from denying *A*'s title.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 292 of 1906, presented against the decree of S. RANGANADA

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(1) (1909) I.L.R., 36 Calc., 193. (2) (1907) I.L.R., 34 Calc., 456

* Second Appeal No. 1143 of 1909.

AYLING AND SPENCER, JJ.
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DEVALRAJU v. MAHAMED JAFFER SAHIB.

MUDALIAR, the District Munsif of Ellore, in Original Suit No. 71 of 1905.

The facts of this case are fully stated in the judgments.

P. Narayanamurthy for appellants

A. Krishnaswami Aiyar for respondent.

AYLING, J.—The Subordinate Judge has reversed the District Munsif's decree on two grounds: (1) that as a competent court has decided in Original Suit No 139 of 1901 that the second plaintiff and not the first plaintiff (appellant) is the *dharmakarta*, the appellant cannot maintain a suit on the basis of a rent deed executed to him as *dharmakarta*; (2) that the defendant has discharged the claim in full.

The second contention is undoubtedly inadmissible. Not only was no plea of discharge set up by the first defendant, but it is clear that the Subordinate Judge's view that the payments noted on the foot of the deed Exhibit A, operated as a full discharge of the rent to the end of the lease is based on a mistaken view of that document. It is distinctly stated in Exhibit A that the last payment is only for faslis 1309 and 1310.

The other point is more difficult of decision. On the whole I am inclined to think that it must be governed by section 116 of the Evidence Act, which prevents a tenant during the continuance of his tenancy from denying his landlord's title at the commencement thereof In this case there is nothing to indicate that the tenancy under Exhibit A has terminated. The first defendant has not attorned to the second plaintiff in any way nor has he been evicted. It is argued with some plausibility that the decree in Original Suit No. 139 of 1901 is tantamount to a determination of the tenancy; but after careful consideration I do not think this plea can be accepted in the peculiar circumstances of this case. The second plaintiff got a decree for possession and for mesne profits, but he has not executed the former portion and has entered into a compromise with the first plaintiff by which he accepted certain money payments in full satisfaction of his claim for mesne profits Even apart then from the second plaintiff's being joined in the present suit and acquiescing (as he appears to have done) in the first plaintiff's claim there is no reason why the first defendant should not be held bound by the ordinary rule of estoppel or should be allowed to escape payment of the rent due by him in accordance with the terms of the lease.

In my opinion the decree of the Subordinate Judge must be set aside, and that of the District Munsif restored with costs throughout.

SPENCER, J —This is a suit between landlord and tenant The lease deed upon which the first plaintiff (appellant) sues is Exhibit B; its term is six years from fasli 1307 to fasli 1312; and the present claim is in respect of rent for faslis 1310, 1311 and 1312

The suit was decreed in the Court of First Instance. In the Subordinate Judge's Court, the District Munsif's decision was reversed and the suit was dismissed on the grounds (1) that the first plaintiff could not maintain the suit when it had been declared in a separate suit (Original Suit No. 139 of 1901) that not he but another named D Sivaramayya who was added as second plaintiff was the rightful *dharmakarta* of the Onkara Visveswaraswami temple, (2) that he had received Rs 900 and odd from the defendant in full discharge of the rent due up to fasli 1312

On the second point the Subordinate Judge was clearly wrong in deciding the case upon a plea of discharge which the defendant did not set up in his written statement Further he based his opinion upon the entries of payment made at the foot of the lease deed and these entries do not show that anything was paid for any fasli subsequent to 1309 and 1310.

On the first point the short answer is the provision of section 116 of the Evidence Act, which lays down that a tenant cannot during the *continuance of the tenancy* be permitted to deny that his landlord had a good title at the beginning of the tenancy. The relation of landlord and tenant continues until it is proved to have ceased (*vide* section 109, Evidence Act). But it is argued that in this case the landlord's title has determined by notice of the decision of a competent court in a suit to which he was a party, and that justice requires that the tenant should be permitted to raise this plea as he is liable to the person who has the real title and may be forced to make payment to him. The answer to this is that the tenant does not allege in his written statement that he has surrendered possession to his landlord, or has been evicted by title paramount, or has attorned thereto, or that at least he has given notice to his landlord that he intends to claim under another and more valid title. In "Bigelow on the Law of Estoppel," 5th edition, page 520, it is stated that it is settled law that a tenant in possession cannot, even after the expiration of his lease, deny

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his landlord's title without adopting one of these four courses. Here the lease did not expire till the end of fasli 1312, and as between the first plaintiff and the defendant it must be treated as in full force and effect till the close of its period of six years. Here I may note that I agree with the Subordinate Judge that the second plaintiff was not a necessary party to the suit. For the theory that the establishment of a subsequent paramount title does not absolve a tenant from payment of rent during the continuance of the tenancy where enjoyment continued, reference may be made to "Everest and Strode's Law of Estoppel," 2nd edition, page 277, where the following observation occurs:—

"A tenant may dispute his landlord's title, if he has been *evicted by title paramount, and by a party entitled to the immediate* possession of the premises; or if under threat of eviction by a party having a title paramount and entitled to the immediate possession of the premises, he has attorned tenant." A note is appended that the eviction must, it appears, be actual and not merely constructive, and authorities are cited An unexecuted decree for possession would not, I think, amount to eviction. In the present case also there seems to be no danger of the tenant having to pay the rent twice over as the defendant has not attorned to the second plaintiff. It was only from the present first plaintiff that the second plaintiff as the rightful *dharmakarta* got a decree for the recovery of mesne profits in Original Suit No. 139 of 1911 The present defendant was *ex parte*.

The decree of the Lower Appellate Court is set aside and that of the Original Court restored with costs against the respondent in both Appellate Courts.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

1911. August 8, 10, 11 and 15.

RAJA V K M. SURYA ROW BAHADUR (CLAIMANT), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

Accretion—Island, formed in the mouth of a river subsequently becoming joined to the mainland, ownership of.

Where an island is formed in the mouth of a river, which subsequently becomes part of the mainland through the drying up of the intervening channel, the increase being perceptible or sudden, the land which formed the island is not an accretion to the mainland but merely an "adjunction" and the owner of the mainland obtains no proprietary rights therein as against Government.

SECOND APPEAL presented against the decree and judgment of F. H. HAMNETT, the District Judge of Gōdāvari, in Appeal Suit No. 592 of 1903, presented against the decree of E. A. SMITH, the Forest Settlement Officer, Kistna etc., districts in Claim No. 3 of 1902.

The facts of this case are sufficiently stated in the judgment.

S. Srinivasa Aiyangar and *P. Narayanamurti* for appellant.

The Government Pleader for respondent.

JUDGMENT.—This appeal relates to a claim preferred by the Raja of Pittapur (appellant) to two blocks of land situated on the coast of the Gōdāvari district near the mouth of the Coringa river, and included in the Coringa Extension Forest Reserve. They are marked B and C in the Reserve map—Exhibit II. The nature of the appellant's claim to the latter block is expressed somewhat ambiguously in the plaint, but the case now put forward is that both blocks are accretions to the lands of appellant's zamindari and therefore his property.

The District Judge has found that both blocks are not accretions to appellant's lands, but islands formed in the sea, and therefore the property of Government. He has further found that as both blocks came into existence after 1842, that is, within

* Second Appeal No. 1316 of 1909.

AYLING AND SPENCER, JJ.

SURYA ROW BAHADUR v. SECRETARY OF STATE FOR INDIA.

60 years of the date of Reservation notice (1901), it is impossible for appellant to have obtained a title as against Government by adverse possession.

It may be mentioned here that claims to the same blocks on similar grounds were put forward by another neighbouring land-holder. His claims were enquired into in the same proceedings and eventually disposed of by this Court in Second Appeal Nos. 1434 and 1435 of 1904 [*vide Sri Raja Chelikani Rama Rau* v. *Secretary of State for India*(1)], and dismissed, the District Judge's findings being upheld. This decision is, of course, not binding on the present appellant whose appeal was presented three and a half years out of time, the delay being excused on the ground of his minority.

A special feature of the case is the existence of a series of excellent maps and charts prepared by officers of the Indian Navy and others and bearing dates 1842, 1846 and 1857. These enable us to follow, with some degree of certainty, the process of formation of the lands in question. The evidence they furnish of the state of things in the years to which they relate is entitled to incomparably more weight than any oral testimony; and the District Judge was quite justified in treating the latter as negligible.

As regards the second point above referred to, these maps are conclusive. The maps of 1842 show no trace of the disputed blocks. The learned vakil for the appellant argues that these maps embody the result of surveys made some years before, and therefore it cannot be inferred that the lands might not have been formed more than a year prior to the date of publication and therefore more than 60 years before 1901. But Exhibit IX a map bearing date 1846, and which there is no reason to suppose to record any but a then recent survey, shows that at that time the blocks in question, while in process of formation, were only dry at low water or half tide. It is clear therefore that they could not possibly have been the subject of effective occupation.

Appellant can therefore only prove his case by showing that the lands when first formed were accretions to his lands. In the case of Block B, the determination of this question involves the consideration of a somewhat difficult legal point regarding the nature of an accretion. But in the case of Block C, the matter is

(1) (1910) I.L.R., 33 Mad., 1.

simplified. [Their Lordships having held on the facts that with regard to Block C, the coast line in its proximity was not proved to belong to the appellant, the judgment continued.]

The case of Block B is different This is a much smaller strip of land forming the coast line north of the Mutlapalem creek. It undoubtedly lies due east of that portion of the coast line as existing in 1842 or earlier which belonged to the Pittapur zamindari, and, if it is an accretion at all, it is an accretion to that portion. Its western boundary is an imaginary line running due north and south; and the appellant's vakil has sought to make capital out of the fact that the land lying west of this again marked A in Exhibit II, which was presumably formed in precisely the same way as Block B, has not been included in the reserve. It is suggested that it was excluded, because it belonged to the appellant and it is argued that if this excluded portion belongs to him so must the leewared extension of it which forms block B This argument, however, depends on the fallacy that in selecting a forest reserve the Forest Department always includes all land liable to inclusion; of course this is not so The advantages of a straight boundary, the necessity of leaving some margin for free use, and other considerations all come into play; and as far as we can see there is no ground whatever for holding that the Government has tacitly recognised that the land west of Block B is private land. How then was the land of which Block B is the eastern portion formed? Was it formed as a gradual accretion to the coast line of appellant's villages as the appellant contends, or was it originally thrown up above high water mark in the shape of an island or islands separated from the coast by a stretch of water, which has since disappeared and become dry land.

Here again the maps and charts, Exhibits I, IV, V, and IX are of invaluable assistance. Exhibits I and IV dated 1842 show no sign of these lands. Exhibit IX dated 1846 shows a large extent of sand or mud bordering the outlet of the Coringa river and stretching as far north as the Cholinga creek which is about opposite the middle of what is now Block B. This sand or mud was then submerged at high water and even at low tide would appear to join the mainland only at its southern extremity, at the mouth of the Coringa river; one may say with confidence that the whole formation was due to the gradual deposit of silt brought down the Coringa river and slowly piled up on either side of its

ATLING AND SPENCER, JJ.

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mouth as it debouched into the sea. This map shows the first traces of a further development, which is more obvious in Exhibit V of 1857. As the soft mud rose to low water level it was bisected by the flow of water from the much smaller Mutlapalem creek and in this way two blocks were formed, the northern one being that of which Block B is a portion. Exhibit V shows for the first time dry land. We have a long narrow strip of land running north and south from about a mile north-east of Mutlapalem to the Cholinga creek. Between it and the coast of the mainland lies a strip of "swamp" in the middle of which is a narrow channel of water. The "swamp" appears to vary in width from less than a furlong to nearly half a mile. Seaward of the sand hills is a stretch of sandy mud, the result of further deposit of silt, and there can be no doubt that the whole of Block B as well as the adjacent land marked A in Exhibit II is formed out of this original line of sand hills and the accretions thereto caused by the continued deposit of silt. It is necessary to go into the facts thus fully in order to apply the doctrine of accretion to them, the fate of Block B depends simply on whether the original line of sand hills be treated as an accretion to the neighbouring coast line or as an island formed in the sea.

In the latter case the sand hills and all accretions to them are the property of the Crown. *Vide Sri Raja Chelikani Rama Rau v. Secretary of State for India*(1), to quote no other authorities.

From the fact stated it will be clear that when the sand hills first rose above high water level and became dry land they must have been separated from the coast by a strip of water of greater or less breadth. There is no reason to suppose that it was even of great depth; but some water there must have been even at low tide (*vide* Exhibit V). As to width, it was probably coterminous at high water with the "swamp." Are these facts inconsistent with the "sand hills" being treated as an "accretion" to the mainland?

In our opinion they are lands so formed and in the first instance a vertical raising of the bed of the sea, rather than a lateral extension of the pre-existing land. And as regards the latter, they would, after the disappearance of the water originally intervening, be better described (if we may coin a word) as an *adjunction* rather

(1) (1910) I.L.R., 33 Mad., 1.

AYLING AND SPENCER, JJ.
—
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than an accretion. A good deal of light is thrown on the true meaning of the latter expression by some remarks of their Lordships of the Privy Council in *Sri Balusu Ramalakshmamma v. The Collector of the Gōdāvari District*(1) wherein they speak of "a promontory pushed out by imperceptible deposits."

The theory of accretion and the principles on which it is based are discussed by this Court in *Secretary of State for India v. Kadirkutti*(2) and we may also refer to the remarks in Coulson and Forbes' "Law of Waters" 3rd edition, pages 42 and 43. It is in our opinion impossible to speak of the process which took place in this case as a gradual and imperceptible accretion. The mainland here received no addition at all until the space of water which originally interposed between it and the sand hills was turned into dry land and the addition which it then received was an addition of a fairly large stretch of dry land which had come into existence some appreciable time before.

As remarked in the Law of Waters, "Where the increase is sudden or *perceptible* the land gained belongs to the Crown" And it would not for a moment be contended that if a piece of land of equal size had even severed from the land and surrounded by the sea it would not remain the property of the original owner. None of the basis on which the doctrine of accretion depends will cover a case of this kind.

It is of course possible to imagine a case in which the raising of the bed of the sea was so nearly uniform that it might be very difficult to say whether the dry land resulting therefrom was, at its first appearance, detached from the mainland or adhering to it. But this is certainly not such a case, and while we would guard ourselves against laying down any principle of general applicability, we feel no hesitation in deciding the present case on the lines above indicated.

We need do no more than refer to the argument of appellant's vakil that we should have regard to the Provisions of the Bengal Alluvion and Deluvion Regulation (Regulation 11 of 1825) This regulation has no applicability to the Madras Presidency and no authority has been quoted for holding that the test of fordability laid down therein is based on any principle of English Law, which it would be our duty to follow For the same reason

(1) (1899) I.L R., 22 Mad., 464 at p 469 [P C] (2) (1890) I L R., 13 Mad., 369.

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the case, *Mr. J. P. Wise* v. *Ameerunnissa Khatoon*(1) has no applicability.

The finding of the District Judge that Block B is not an accretion to appellant's land is correct.

This second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. Aug. 15, 16.

MALAIYYA PILLAI (FOURTH DEFENDANT), APPELLANT,

v.

T. PERUMAL PILLAI AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS 1 TO 3), RESPONDENTS *

Specific Relief Act (I of 1877), sec. 42—Declaration, when will be given.

In order that a suit can be held not maintainable by reason of the proviso to section 42 of the Specific Relief Act (I of 1877), it must be shown that the defendant was in possession, and that as against him the plaintiff could have obtained an order for delivery of possession.

SECOND APPEAL presented against the decree of K. SRINIVASA ROW, the Subordinate Judge of Tuticorin, in Appeal Suit No. 262 of 1907, presented against the decree of T. MUNRO FRENCH, the Additional District Munsif of Tinnevelly, in Original Suit No. 171 of 1906.

By an agreement (Exhibit A), dated 2nd September 1901, it was arranged that the plaintiff and defendants should manage certain family charities in turn. Dispute having subsequently arisen between the plaintiff and defendants as to the management of charities which culminated in disturbances, proceedings were instituted under sections 145 and 146, Criminal Procedure Code (Act V of 1898), before the District Magistrate, Tuticorin, who ordered the chattram and lands belonging to the charities to be attached on 5th December 1903 (Exhibit B), and appointed the Tahsildar of Srivaikuntam Receiver pending the settlement of the disputes in the civil courts. On 5th February 1906,

(1) (1865) 2 W.R., 31.

* Second Appeal No. 631 of 1909

this order was reversed by the High Court, which ordered the case to go back to the Head Assistant Magistrate to be dealt with, holding that the attachment was illegal. It appears that at the date when the receiver was appointed, possession of the chattram was with the defendants and the lands with the plaintiff. On 18th February 1906, the authorities, instead of returning the chattram to the defendants and the lands to the plaintiff, gave possession of both to the defendants.

Meanwhile, the present suit was filed by the plaintiff on 1st January 1905 for a declaration of his right to the chattram and the lands and to conduct the charities in accordance with the agreement (Exhibit A). He also asked for an injunction to restrain the defendants from interfering with the charities and for damages.

The District Munsif dismissed the suit holding on a construction of Exhibit A, that the plaintiff had forfeited his rights. This decision was reversed on appeal by the Subordinate Judge who granted the declaration and injunction prayed for. In doing so he held that the defendant's possession of the lands was no possession in law and that they must be construed to be in possession of the plaintiff.

Defendants appealed.

T. Rangachariar for appellant.

V. C. Seshachariar for first respondent.

K. Parthasarathi Aiyangar for second respondent.

JUDGMENT.—The first contention urged before us is that the Magistrate's order under section 146, Criminal Procedure Code, putting the chattram in the possession of the Tahsildar being set aside by the High Court which directed possession to be given to the defendants, the plaintiff's suit could not be maintained for a mere declaration of his right But we do not think that this contention should prevail. The defendant was not at the date of the suit in possession of the chattram though he was entitled to obtain possession under the order of the High Court. It is true that the possession of the Magistrate would not be deemed to be adverse within the meaning of the Law of Limitation, but, in order that a suit can be held to be maintainable by the application of section 42 of the Specific Relief Act, it must be shown that the defendant was in possession and as against him the plaintiff could have obtained an order for

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

MALAIYYA PILLAI v. PERUMAL PILLAI.

delivery of possession. It is true that the Magistrate after the order of the High Court was bound to deliver possession to the defendant but he had not yet delivered possession to him when the suit was instituted Supposing that the plaintiff asked for recovery of possession and obtained a decree before the defendant obtained possession from the Magistrate it is difficult to see how such a decree could be effectively executed against the defendant. There is no authority covering this question, and the cases in *Raj Narain Das* v *Shama Nando Das Chowdhry*(1) and *Narayanan Chetty* v *Kannammai Achi*(2) do really throw no light in this connection

As regards the lands it was found that the plaintiff was in possession of them at the date of the suit and that finding is not open to any legal objection.

The next contention is that because the land revenue was not paid punctually on the due date, the plaintiff forfeited his right to manage the charities, although as a matter of fact no damage was caused thereby to the trust property. We are unable to place such a narrow construction on the agreement (Exhibit A). Besides apart from the agreement of the parties, we have to see whether there is sufficient cause for removing the plaintiff from the trusteeship of the charities and no such case has been made out. In our opinion the plaintiff has not forfeited his right and is entitled to the management of the charities and the properties belonging thereto, according to the terms of Exhibit A. We dismiss this Second Appeal with the costs of the first respondent.

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(1) (1899) I.L.R., 26 Calc., 845. (2) (1905) I.L.R., 28 Mad., 338.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar.

M. SESHACHELLAM CHETTY (PLAINTIFF), PETITIONER, 1911. August 17.

v.

TRAFFIC MANAGER, HIS HIGHNESS THE NIZAM'S GUARANTEED STATE RAILWAY COMPANY, LIMITED (DEFENDANT), RESPONDENT.*

Indian Railways Act (Act IX of 1890), section 140—Notice of suit, upon whom to be served.

Under section 140, Indian Railways Act (IX of 1890) notice of suit against a Railway Company can only be served upon the Agent unless it can be shown by evidence that some other officer of the Company had authority to receive the notice.

PETITION, under section 25 of Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore in Small Cause Suit No 977 of 1909.

This petition came on for hearing under the provisions of Order XLI, Rule 11 of the Code of Civil Procedure.

The facts for the purpose of this case are set out in the judgment.

T. Prakasam for petitioner.

The respondent was not represented.

JUDGMENT.—This is a suit against the Nizam's Guaranteed State Railway Company claiming damages for non-delivery of goods entrusted by the plaintiff to the defendant for delivery at Kondapalli. The suit has been dismissed by the lower Court on the ground that the defendant Company had not proper notice of the claim, and the only question I have to decide in the case is whether this finding is correct.

Notice was given by the plaintiff within the period required by section 77 of Act IX of 1890 to the Traffic Manager. Section 140 of the Act requires that any notice required to be served on the Railway Administration may be served on the Agent of the Railway Company, no other person is designated for the purpose

* Civil Revision Petition No 614 of 1910.

SUNDARA AYYAR, J.

SESHACHELLAM CHETTY v. TRAFFIC MANAGER, HIS HIGHNESS THE NIZAM'S GUARANTEED STATE RAILWAY COMPANY, LIMITED.

by the Act. The plaintiff adduced no evidence to show that any other person was authorised to receive notice on behalf of the Company. It has been laid down in a series of cases that the proper person on whom notice should be served is the Agent. See *Woods* v. *Meher Ali Bepari*(1); *G.I.P. Railway Company* v. *Dewasi*(2); *Great Indian Peninsula Railway Company* v. *Chandra Bai*(3); *Nathar Chand Shaha* v. *Wood*(4). No doubt it may be shown by evidence that some other officer of the Company had authority to receive the notice either by showing that he was the person who, according to the practice of the Company, dealt with the claims of the particular character in question or that there were rules framed by the Railway Company authorising him to receive the notice, or in some other legal manner. The plaintiff has not adduced any evidence in this case to prove that the Traffic Manager to whom the notice was sent was authorised to receive it. The only evidence to which the learned counsel for the petitioner has drawn my attention is the statement of the Traffic Manager that the plaintiff's claim was barred. It is impossible for me to hold that this is sufficient to hold that the plaintiff was entitled to serve the notice on him. I am constrained to dismiss this petition.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

1911. August 18

E KARUNAKARAN NAIR (SECOND DEFENDANT), PETITIONER,

v.

M. KRISHNA MENON AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS. *

Limitation Act (IX of 1908), sec. 75—Bond repayable by instalments; the whole to become payable "on demand" on default in paying one instalment—Meaning of "on demand"—Waiver.

A bond repayable by instalments contained the following stipulation :—

"In default of our making such payment also the amount that may be found due for all future drawings shall be paid in a lump on your demand."

Held, that the cause of action for recovery of all the instalments would not arise until demand is made by the obligee in terms of the stipulation and that in

(1) (1908) 13 C.W.N., 24. (2) (1907) I.L.R., 31 Bom., 534.
(3) (1906) I.L.R., 28 All., 552. (4) (1908) I.L.R., 35 Calc., 194.

* Civil Revision Petition No. 292 of 1910

consequence the whole amount did not become due merely on failure to pay an instalment.

Hanmantrám Sadhurám v. *Arthur Bowles*, [(1884) I.L.R., 8 Bom., 561], followed.

The words "on your demand" mean "when you require" Failure to make the demand will constitute a waiver of the right stipulated for.

Hurri Pershad Chowdhry v. *Nasib Singh*, [(1894) I.L.R., 21 Calc., 542 at p. 547], and *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty*, [(1904) I.L.R., 31 Calc., 297], dissented from.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of A. N. ANANTARAMA AIYAR, the Subordinate Judge of South Malabar at Calicut, in Small Cause Suit No. 946 of 1909, dated the 17th day of January 1910.

The facts of this case are stated in the judgment.

V. Ryru Nambiar for petitioner.

B. Govindan Nambiar for respondents.

JUDGMENT.—This suit was to enforce payment of Rs 54-7-10 due on a simple money-bond and the question is whether it is barred. The bond provided for the payment of certain instalments and the earliest instalment included in the suit is the one which became due in December 1906, *i.e.*, within three years of the institution of the suit. The question is admittedly governed by article 75 of the Limitation Act and it is contended that the suit is barred because there was a default to pay one instalment more than three years before the date of the suit. And the bond provides that on failure of payment of one instalment the entire amount would become due. The stipulation in question is in these words: "and that in default of our making such payment also, the amount that may be found due for all future drawings from the date of default at Rs. 5 per drawing shall be paid in a lump *on your demand* in accordance with the stipulations in the *Kurivari*" I think the Subordinate Judge is right in holding that this case is analogous to that reported in *Hanmantrám Sadhurám* v. *Arthur Bowles*(1) and that the cause of action for recovery of all the instalments would not arise until demand is made by the obligee in terms of the stipulation. I do not agree with the learned vakil for the petitioner that the words "on your demand," etc.

(1) (1884) I.L.R., 8 Bom., 561.

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KARUNAKARAN NAIR v. KRISHNA MENON.

should be understood only to mean that the payment was to be made immediately or forthwith. He relies on *Perumal Ayyan* v. *Alagirisami Bhagavathar*(1) in support of his contention. But the learned Judges there had only to construe the document then before them and they do not lay down any general proposition which can be said to apply to this case I may mention that in *Nettakaruppa Goundan* v. *Kumarasami Goundan*(2) an unreported case is referred to where the words "on demands" were given the same meaning as "when you require."

Apart from this it seems to me that under article 75 it might well be said that the plaintiff not having thought fit to enforce the proviso in question waived the benefit of it and if this view be correct then time will run only from the date of each fresh default. I however find that in *Hurri Pershad Chowdhry* v. *Nasib Singh*(3), which is followed in *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty*(4), it is laid down that there can be no waiver within the meaning of the third clause of article 75 save by payment of and acceptance of an overdue instalment. With great deference to the learned Judges I fail to see any reason for such construction. Whether there was waiver or not is a question of fact the proof of which cannot be confined to any particular kind of evidence and it seems to me that when a man abstains to take advantage of a stipulation in his favour that is at least a very strong evidence of waiver. This petition is therefore dismissed with costs.

ORIGINAL CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

1911. August 17 and 22.

V. ANDIAPPA CHETTY (PLAINTIFF),

v.

P. DEVARAJULU NAIDU'S SON BY HIS NEXT FRIEND ALASINGA NAIDU AND ANOTHER (DEFENDANTS).*

Limitation Act (IX of 1908), sec. 19—Acknowledgment of liability.

The following two letters were sent by first and second defendants respectively to plaintiff's vakil:—

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(1) (1897) I.L.R., 20 Mad., 245.
(2) (1899) I.L.R., 22 Mad., 20 at p. 22.
(3) (1894) I.L.R., 21 Calc., 542 at p. 547.
(4) (1904) I.L.R., 31 Calc., 297.

* Referred Case No. 13 of 1910.

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ANDIAPPA CHETTY v. ALASINGA NAIDU.

"will please forward the copy of the account or instruct your client to "send his gumastah with his account books."

The cases cited at the bar and referred to in the judgments of the Judges of the Small Cause Court are *Quincey* v. *Sharpe*(1), *Sitayya* v. *Rangareddi*(2), *Jogeshwar Roy* v. *Raj Narain Mitter*(3) and *Maniram Seth* v. *Seth Rupchand*(4). The circumstances of those cases seem to be all distinguishable from the present but before proceeding to discuss them we may say at once that we agree with the observation of MACLEAN, C.J., in *Jogeshwar Roy* v. *Raj Narain Mitter*(3) that unless the language of the document be identically the same a decision upon the construction of one document is not of much assistance to the Court in construing another.

In *Quincey* v. *Sharpe*(1) the debtor took the initiative by asking his creditor for an account for work done before he received any demand to pay, thus implying that some work had been done and that it would have to be paid for.

In *Sitayya* v. *Rangareddi*(2) the accounts which had to be taken were mutual, open and current accounts to which article 85 of the Limitation Act applied; and in *Maniram Seth* v. *Seth Rupchand*(4) the accounts were open and current, though the Privy Council in the view that they took, found it unnecessary to decide whether they were also mutual and the learned Judges contented themselves with observing that the dealings were not the ordinary ones of banker and customer but rather in the nature of mutual accommodation.

Section 19 of the Limitation Act is so worded as to suggest that, where there is an acknowledgment of liability in respect of a right and it is sought to use such acknowledgment for starting a fresh period of limitation, the right acknowledged must be of the same description as the right which is the subject of the suit. Thus in a suit for the balance due upon taking accounts an admission that accounts must be taken and settled would be a pertinent acknowledgment, but it might be otherwise in a suit brought to recover a definite sum of money. So also it is not difficult to see that asking for an account in response to a creditor's demand may be a very different thing from acknowledging the necessity of settling accounts when a creditor bases his right upon accounts.

(1) (1876) L.R.1., Ex. D, 72. (2) (1887) I.L.R., 10 Mad., 259.
(3) (1904) I.L.R., 31 Calc., 195 at p. 200. (4) (1906) I.L.R., 33 Calc., 1047.

The decision in *Jogeshwar Roy* v. *Raj Narain Mitter*(1) is quoted in support of the view taken by the majority of the Judges who made this reference.

There a house-owner who received from a contractor a bill for building-work done by him wrote that the bill was incorrect in parts and that the work was unfinished but promised to examine the work and the estimates and see what was due. It was held that this was not an acknowledgment of liability within the meaning of section 19 of the Limitation Act

In point of fact however none of these cases really stand on a parallel footing to that with which we are now dealing Each case must be treated on its own merits. From a consideration of the wording of Exhibits A and B we are of opinion that they do not contain any acknowledgment of liability sufficient to save limitation. We think there is much force in the comparison made by the Chief Judge of the Small Cause Court between the request of the first defendant in Exhibit A for a copy of a statement of accounts and the case of a tradesman who sends a bill for a certain sum with the words " to account rendered " to which the customer replies : " Please send me a detailed bill. " We agree with him in thinking that such words would not amount to an admission of liability. The expression by the second defendant in Exhibit B of a wish to examine the contractor's accounts does not carry the matter further. The questions referred to us must therefore be answered in the negative.

(1) (1904) I.L.R., 31 Calc., 195.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912 July 24, 31. August 30.

In re R NATARAJA IYER (PETITIONER), ACCUSED.*

Certiorari, writ of,—Power of High Court to issue—Income-tax (Act II of 1886), —Criminal Procedure Code (Act XIV of 1898), sec. 476,—when order may be passed under

(1) *Per* SUNDARA AYYAR, J —

The High Court has no jurisdiction to issue a writ of *certiorari* on an officer beyond the limits of its jurisdiction.

Per SADASIVA AYYAR, J —

The High Court has such jurisdiction.

Per Curiam.—

(2) A Divisional Officer hearing appeals under the Income-tax Act (II of 1886) is a Court.

(3) Presuming the High Court to have jurisdiction, a petition may be entertained by the High Court to set aside the order of such Court passed under section 476 of the Criminal Procedure Code (Act XIV of 1898), it not being necessary for the petitioner to have appealed to the Revenue Board.

(4) The Divisional Officer's order under section 476, Criminal Procedure Code, was not bad for want of jurisdiction as being passed long after the close of the Income-tax proceedings

(5) Even assuming that the order is bad for want of jurisdiction and that the High Court has itself jurisdiction to proceed by way of *certiorari*, the High Court is not bound to interfere and quash the proceedings if on the merits petitioner has no case.

Petition dismissed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of T. RUNGASWAMI AIYANGAR, the Deputy Collector of Ariyalur, dated the 1st day of November 1910.

The facts of this case are stated in the judgment.

Dr. *S. Swaminathan* for the petitioner.

The Public Prosecutor on behalf of Government.

SUNDARA AYYAR, J.—The proceedings which led up to the two petitions before us may be briefly stated as follows:—

The petitioner Nataraja Iyer was assessed to income-tax in an annual income of Rs. 4,400 for the official year 1910–11. He

* Criminal Revision Case No. 609 of 1911.
{Criminal Revision Petition No. 882 of 1911.
Criminal Miscellaneous Petition No. 820 of 1911.}

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

IN re NATARAJ IYER.

appealed against the assessment to the Revenue Divisional Officer of Ariyalur, who was the collector of taxes under the Income-tax Act, II of 1886. At the hearing of the appeal a sworn statement was taken from the petitioner. The appeal was rejected on the 30th July 1910. On the 25th August 1910 the Divisional Officer wrote to the Collector suggesting that sanction might be accorded for the prosecution of the petitioner for certain false statements contained in his sworn statement. The Collector apparently did not consider it necessary to take any steps. On the 15th October 1910, the Divisional Officer issued notice to the petitioner to show cause why an order under section 476 of the Criminal Procedure Code should not be passed directing his prosecution for making false statements. On the 1st November 1910, the Divisional Officer passed final orders under section 476 directing the prosecution of the petitioner. The petitioner made two previous infructuous attempts to avoid prosecution to which it is unnecessary to refer in detail *Criminal Revision Case* 509 *of* 1911 is an application to this Court under section 435 of the Criminal Procedure Code to set aside the order of the Divisional Officer

The petition is obviously untenable. Under section 435, this Court has power to call for and examine only the record of a proceeding before an inferior Criminal Court. The Divisional Officer certainly did not act as a Criminal Court in passing the order under section 476. He apparently acted as a Revenue Court. Whether he was in reality a Revenue Court and had power to pass the proceedings are questions that will have to be subsequently dealt with. But it is clear that the order was not passed by him as a Criminal Court. The petition must therefore be dismissed.

Criminal Miscellaneous Petition No. 320 *of* 1911 is an application asking this Court to quash the proceedings of the Divisional Officer on the ground of absence of jurisdiction in him to pass the order. A writ of *certiorari* was applied for This Court issued the writ and the record of the proceedings of the Divisional Officer has been sent up to this Court. The petitioner's contention is that the Divisional Officer in determining an appeal under the Income-tax Act did not act as a Court; and he had therefore no jurisdiction to pass an order under section 476 of the Criminal Procedure Code; secondly that even if he was a Court he had no jurisdiction to pass an order directing a prosecution long after the proceedings in the Income-tax appeal had been closed.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.
—
In re NATARAJA IYER.

The learned Public Prosecutor, on the other hand, contends first, that we have no jurisdiction to issue a writ of *certiorari* on an officer beyond the Original, Civil and Criminal jurisdiction of this Court; secondly, that this will not quash the proceedings on *certiorari* as the petitioner had other remedy open to him, because the Divisional Officer was a Revenue Court in hearing appeals under the Income-tax Act and the order was one which could be set aside by the Revenue Board to whom the Divisional Officer was subordinate; thirdly, that assuming that this Court has jurisdiction to quash an order of a Divisional Officer passed as a Revenue Court, there was no such defect of jurisdiction as to call for our interference and the case is not a fit one for the exercise by this Court of its discretionary power to quash the proceedings on *certiorari.*

The questions for our decision are—

(1) Has this Court jurisdiction to issue a writ of *certiorari* on an officer beyond the limits of its original jurisdiction?

(2) Was the Divisional Officer a Court in hearing appeals under the Income-tax Act?

(3) If he was a Court should the petitioner have appealed to the Revenue Board to get the Divisional Officer's order set aside?

(4) Was the order of the Divisional Officer bad for want of jurisdiction on the ground that it was passed long after the close of the Income-tax proceedings?

(5) Is this a proper case for the exercise of our discretion to quash the Divisional Officer's proceedings on *certiorari*?

On the first question, after hearing the elaborate arguments on both sides, I have come to the conclusion that this Court has no power to issue the writ on an officer outside Madras. Section 9 of 24 and 25 Vict., C. 104, known as the High Courts Charter Act provides that the High Court "shall have and exercise all such Civil, Criminal, Admiralty, and Vice-admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate, and all such Powers and Authority for and in relation to the administration of Justice in the Presidency," as Her Majesty may by Letters Patent grant and direct, and it further provides that "the High Court to be established in each Presidency shall have and exercise all Jurisdiction and every power and Authority whatsoever in any Manner vested in any of the Courts in the same Presidency

abolished under this Act at the time of the Abolition of such last-mentioned Courts." The old Supreme Court and the Court of Sudder Dewany Adawlut and Foujdarry Adawlut were abolished by the establishment of the High Court—(section 8). Neither the Charter Act nor the Letters Patent of the High Court expressly conferred on it the power to issue a writ of *certiorari* outside the limits of its original jurisdiction. The question is whether it has such power under section 9 of the Charter Act in consequence of its having been possessed by the Supreme Court or by the Sudder Court.

It is admitted that the Sudder Court possessed no such power, although it apparently possessed some powers of superintendence over the Courts subordinate to it. See Cowell's "Courts and Legislative Authorities in India," page 109. But it is contended that the Supreme Court had the power. The powers of the Supreme Court were regulated by 39 and 40 Geo. III., C. 79, which authorized His Majesty the King of England to constitute Supreme Courts for Madras and Bombay by Charter or by Letters Patent and Letters Patent were issued on the 26th December 1801 in pursuance of the Statute. In addition to the powers expressly given by that Statute and the Letters Patent, Supreme Court was to have all the powers possessed by the Recorder's Court which was then abolished See clauses 4 and 55 of the Letters Patent. The Recorder's Court again which was established by 37 Geo. III., C. 142, inherited all the powers possessed by the Mayor's Court established by 26 Geo. III., C. 57. But none of these Courts had, in my opinion, the power to issue a writ of *certiorari* in cases of this sort. The Mayor's Court had Civil as well as Criminal Jurisdiction "over all British subjects whatsoever who now reside or shall hereafter reside within any of the ports, factories, towns, lands or territories in the possession of the said United Company on the Coast of Coromandel, or in any other part of the Carnatic, or in the five Northern Circars, including those parts of the said Circars which lie within the kingdom or province of Orissa, or within any of the dominions or territories of the Soubah of the Deccan, the Nabob of Arcot or the Raja of Tanjore" (see section 30 of 26 Geo. III, C. 57). It will be observed that the jurisdiction of the Court was confined to British subjects. There can be no doubt that the expression "British subjects" was intended to include only European British subjects,

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that is, a native or a descendant of a native of Great Britain. The jurisdiction of the Recorder's Court was laid down in sections 10 and 11 of 37 Geo. III., C. 142. Section 10 which extended to all "British subjects" residing within any of the territories subject to or dependent on the Government of Madras, provided that the Court shall have full power and authority to hear and determine complaints against any of His Majesty's subjects (that is, British subjects) for any crimes, misdemeanours and oppressions and also all suits and actions whatsoever against them arising in territories subject to or dependent on the Government of Madras or within any of the dominions of the Native Princes of India in alliance with that Government, or against any person who at the time when the cause of action arose was employed by or was directly or indirectly in the service of the United Company or any British subject. Section 11 enacted that the Recorder's Court should have power to try all suits and actions either civil or criminal which by the authority of any Act of Parliament might at the date of the Act be tried by the Mayor's Court at Madras or by the Courts of Oyer and Terminer and Gaol delivery there; and all powers vested in the Mayor's Court or the Court of Oyer and Terminer were conferred on the Recorder's Court. Here again it will be noted that the jurisdiction of the Court was confined to British subjects, to persons in the employ of the Company or of a British subject within the territories subject to or dependent on the Government of Madras.

The jurisdiction of the Supreme Court is laid down in various clauses of the Letters Patent. Clauses 21 and 22 refer to civil jurisdiction Clause 31 confers all the equitable powers of the Court of Chancery in England within the limits of the Court's jurisdiction. Clause 32 confers jurisdiction over lunatics and infants. Clauses 33 and 34 confer criminal jurisdiction. Clause 37 gives the Court ecclesiastical jurisdiction including matters relating to probates of wills and letters of administration. Clauses 41 and 42 confer admiralty jurisdiction. Under clause 21 the civil jurisdiction embraced the power to hear and determine suits and actions against British subjects in territories subject to or dependent on the Government of Madras or within the dominions of Native Princes in alliance with that Government or against employees of the Government or of any British subject. Clause 22 gave power to try suits against the inhabitants of

Madras. Under clause 33 the criminal jurisdiction was confined to the town of Madras and the factories subordinate to it.

I must now refer to clause 8 on which much reliance was placed by the learned Counsel for the petitioner. It provides "The said Chief Justice and the said Puisne Judges shall severally and respectively be, and they are all and every one of them hereby appointed to be, Justices and Conservators of the Peace and Coroners within and throughout the settlement of Fort Saint George and the town of Madras and the limits thereof and the factories subordinate thereto and all the territories which now are, or hereafter may be subject to or dependent upon the Government of Madras aforesaid and to have such jurisdiction and authority as our *Justices of Our* Court of King's Bench have and may lawfully exercise within that part of Great Britain called England as far as circumstances will admit" It is contended that, notwithstanding the provisions of clauses 21, 22 and 33, this clause must be taken to confer jurisdiction on the Court throughout the territories subject to the Government of Madras. I cannot agree with this contention. The subject-matter of this clause is, in my opinion, quite distinct from that of clauses 21, 22 and 33 which define and limit the civil and criminal jurisdiction of the Court. The object of clause 8 was to confer certain specific powers on the Chief Justice and the Puisne Judges. It is noteworthy that under this clause the Judges are severally appointed as Justices and Conservators of the Peace and Coroners. Clauses 21, 22 and 33 define the jurisdiction of the Supreme Court of Judicature" at Madras. It is the Court that possesses the powors conferred under clauses 21, 22 and 33. Each one of the Judges is a Justice of the Peace and possesses the powers laid down in clause 8, and the powers consist in the jurisdiction and authority which the Justice of the Court of King's Bench had at the time, apparently as Justices respectively and not the jurisdiction and authority of the Court of King's Bench as such. The Judges of the Court of King's Bench, apart from other powers, had the right to issue a writ of *habeas corpus* under 21 Car. II., C. 2. Clause 8 may be invoked to prove a similar right existing in the Judges of this Court to issue a writ of *habeas corpus* to be served on any one anywhere in the territories subject to the Madras Government. It is not contended that the Judges of the Court of King's Bench severally had the power to issue a writ of *certiorari* either under

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the Common Law of England or under any Statute. I cannot hold that clause 8 widens the jurisdiction given to the Court in civil and criminal matters by clauses 21, 22 and 33. It must be remembered that there were Courts of Justice established by the East India Company empowered to administer justice in the Company's territories. Clause 23 of the Letters Patent expressly makes reference to such Courts providing that "no action for wrong or injury shall lie against any person whatever exercising a judicial office in any country Court for any judgment, decree or order of such Court, or against any person for any act done by or in virtue of the order of such Court." The Supreme Court was a Court of limited jurisdiction and had no general control over the proceedings of the Courts erected and maintained by the East India Company. It is unnecessary to consider whether they had control in any and what specific classes of cases. I do not deal with the question of the powers of the Supreme Court to issue processes to witnesses and writs of execution outside the limits of its ordinary jurisdiction, in order to exercise the jurisdiction it actually had in civil and criminal matters. (See clauses 17, 27 and 28 of the Letters Patent; also section 13 of 37 Geo. III., C. 142, which relates the powers of the Recorder's Court in this matter.

Reference must be made to another Statute, 4 Geo. IV., C. 71. That Statute empowered the Supreme Court of Madras to exercise the same rights and powers as the Supreme Court of Bengal possessed under any Statute, 13 Geo. III., C. 63, section 13, enacted that it shall be lawful for His Majesty to establish a Supreme Court "which said Supreme Court of Judicature shall have, and the same Court is hereby declared to have, . . . , full power and authority to exercise and perform all civil, criminal, admiralty, and ecclesiastical jurisdiction, . . . , and to form and establish such rules of practice, and such rules for the process of the said Court, and to do all such other things as shall be found necessary for the administration of justice, and the due execution of all or any of the powers which, by the said charter, shall or may be granted and committed to the said Court; and also shall be, at all times, a Court of Record and shall be a Court of Oyer and Terminer, and Gaol delivery, in and for the said town of Calcutta, and the Factory of *Fort William in Bengal* aforesaid and the limits thereof, and the factories subordinate thereto." NORMAN, J., in *In the*

matter of Ameer Khan(1) understood this provision as laying down that "the Court was to be a Court of Judicature for the Presidency of Bengal as well as a Court of Record and oyer and terminer for the town of Calcutta." Sections 14 and 17 of the same Statute defined the civil and criminal jurisdiction of the Court which were to extend only to British subjects and persons employed in the service of the Company or of British subjects and to others who had agreed that any matter should be determined by the Supreme Court. The question before the learned Judge was the right of the Supreme Court to issue a writ of *habeas corpus* for the production of a person confined beyond the limits of Calcutta. The learned Judge proceeded chiefly on section 4 of the Letters Patent of the Bengal Supreme Court corresponding to clause 8 of the Letters Patent of the Madras Court for holding that the Supreme Court had power to issue the writ. If the learned Judge intended to hold that section 13 of the Statute conferred powers to try suits and appeals throughout Bengal, Behar and Orissa, I am, with all deference, inclined to disagree with him No clause in the Letters Patent gave the Supreme Court any appellate powers over the proceedings of the Company's Courts; and section 14 defining the civil jurisdiction was expressly limited in its scope. I am inclined to think that the phrase "for the said town of Calcutta and Factory of Fort William in Bengal aforesaid and the limits thereof and the factories subordinate thereto," qualifies the whole of the preceding portion of the sentence describing the jurisdiction of the Supreme Court. 4 Geo. IV, C. 71, therefore did not extend the powers possessed by the Madras Supreme Court under the Statutes and Letters Patent directly relating to that Court It remains only to add that there is absolutely no doubt that the expression "British subjects" was undoubtedly not meant to include the Indian subjects of the East India Company. See the title of 37 Geo III, C. 142, which refers to British subjects being concerned in loans to Native Princes; section 11 of the same Statute which speaks of natives or descendants of natives of Great Britain as apparently equivalent to British subjects; section 13 which speaks of the inhabitants of Madras to include the Indian subjects of the Company; clauses 21 and 22 of the Charter Act of 1800, the former of which refers to British subjects and the latter to inhabitants of Madras; clause

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(1) (1870) 6 B.L.R., 392.

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34 of Charter Act, which speaks of the King's subjects as equivalent to British subjects.

There is a provision in the Letters Patent of 1800 relating to the writ of *certiorari*. Clause 47 provides that the Court of Requests (that is the Madras Court of Small Causes) and the Court of Quarter Sessions should be subject to the order and control of the Supreme Court in the same manner as the inferior Courts and Magistrates of England are subject to the Court of King's Bench and to that end the Supreme Court is authorized to "award and issue a writ or writs of *mandamus, certiorari, procedendo* or error to be prepared in manner above mentioned and directed to such Court or Courts or Magistrates as the case may require, and to punish any contempt thereof or wilful disobedience thereto by fine and imprisonment." The learned Public Prosecutor relies on this clause as impliedly enacting that there is no power to issue a writ of *certiorari* in any case not covered by it. But if the power could be proved to exist otherwise, I would not be prepared to accept his contention; for it is a well-settled rule that the powers of a Superior Court can be limited or taken away only by some express provision to that effect. I am, however, satisfied on an examination of the Statutes relating to the subject that the Supreme Court did not possess the power to issue the writ on any one beyond the limits of Madras, unless he was a British subject. The jurisdiction over British subjects outside Madras and persons in the employ of the East India Company or of British subjects to hear and determine civil and criminal cases against them would not affect the power to issue the writ. The Supreme Court had no general power or control over the Courts of the East India Company in the mofussil or over their officers acting judicially. I believe this proposition would be correct even in cases where the officers exercising jurisdiction might be British subjects. The Divisional officer in this case is not a British subject in the sense in which that expression is used in the Letters Patent of the Supreme Court; nor can he come within the designation of "one in the employ of the East India Company." It cannot be held that, because the Supreme Court had jurisdiction over servants of the East India Company, the High Court now has similar jurisdiction over all servants of the British Government. It is true, no doubt, that the Company's Servants became the servants of the Crown by virtue of section 58 of 21 and 22 Vict., C. 106. But persons employed subsequent to that Statute by the Crown in the

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first instance cannot be regarded as falling within that description of persons.

I shall now proceed to deal with the cases which were cited during the arguments. There has apparently been no case in which any of the High Courts issued a writ of *certiorari* on an officer beyond the limits of its own original jurisdiction. In *Nundo Lal Bose* v. *The Corporation for the town of Calcutta*(1) it was issued against the President of the Municipal Corporation of Calcutta. In *Pirbhai Khimji* v. *The Bombay, Baroda and Central India. Railway Company*(2), *Reg.* v. *Nathalal Pitambar*(3) and *Reg.* v. *Ramadoss Samaldas*(4) the Bombay High Court held that it had power to issue a writ within its original jurisdiction. In *In the matter of James Pattle*(5) an application was made for the writ on a Zillah Magistrate who, it was alleged, had convicted a British subject without jurisdiction. RYAN, C.J., observed: "The Court has no jurisdiction to remove convictions of Magistrates of Zillahs made on British subjects, but under 53 Geo. III, C. 155. The affidavit denies that the conviction is under this Act and states it to be under certain Regulations of the Bengal Government—we have no power to issue the writ of *certiorari*, and have no means of quashing the conviction were it returned into Court." MALKIN, J., agreed with him. GRANT, J., was of opinion that the conviction should be quashed; but his decision was not based on the ground that the Supreme Court had any general jurisdiction over proceedings of the Zillah Magistrates, but on the ground that the Supreme Court had jurisdiction in a particular class of cases. In *In re Foy*(6) a British subject was convicted by a Mofussil Magistrate. A writ of *habeas corpus* against the Jailer was applied for on the ground that he had no jurisdiction. PEEL, C.J., held that the Court had undoubtedly jurisdiction over all persons in the employment of the East India Company within Bengal, Behar and Orissa and the places annexed thereto in respect of torts and that therefore, whether a jailer were a native or a European, if he had the character of a servant of the East India Company, the Court would have jurisdiction over his wrongful act of unlawful imprisonment. He went on to observe: "This Court, though it has an appellate jurisdiction

(1) (1885) I.L.R., 11 Calc. 275.
(2) (1871) 8 Bom. H.C.R., 59 (O.C.J.).
(3) (1873) 10 Bom. H.C.R., 102 (C.C.)
(4) (1875) 12 Bom. H.C.R., 217 (C.C.).
(5) (1836) Fulton's Rep., 313 (1 Ind. Decns., old series, 828).
(6) (1850) 1 Taylor and Bell, 219 (2 Ind. Decns., old series, 396).

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from the Courts of the Company to a limited extent in certain classes of offences committed by British subjects, has no jurisdiction generally over those Courts. It has therefore no power to rectify a decision if erroneous or avert its consequences. Nor is a writ of *habeas corpus* the proper writ to rectify errors; it brings up the person only; a *certiorari* must issue in addition thereto in order to bring up documents, but this Court has no power to bring up by *certiorari* the proceedings of a Court of the East India Company generally: it follows therefore that we can interfere only in the case where the proceeding is wholly without a judicial foundation to support it, as it would be if the Court had no jurisdiction to try the subject matter. But the Judge had jurisdiction of the cause: he had jurisdiction to summon the offender: he could not know beforehand that the offender was a British subject: and the objection may be untruly made. It is a mixed question itself of law and fact, which must if raised, be tried and determined judicially in the Court. The Court is therefore necessarily acting judicially in the determination of that question. This Court has also a limited jurisdiction; if a party is indicted here for an offence committed in the Moffussil, it is necessary to prove our authority to try him by proving him subject to the jurisdiction." *In the matter of Ameer Khan*(1), and *In re Rudolf Stallmann*(2), were cases where the right of High Court to issue a writ of *habeas corpus* into the mofussil was in question. The point was not decided in the latter case. In the earlier case, NORMAN, J., held that the High Court had power to issue the writ, relying on clause 4 of the Letters Patent of the Bengal High Court. In *Jamuna Bhai* v. *Sadagopa*(3), this Court held that before rules were framed for the execution of the decrees of the High Court, it had power to sell property in the Chingleput district. Attention may be drawn to the observations of INNES, J., as to the scope of the Court's jurisdiction over persons beyond the limits of its original jurisdiction. In his opinion it was confined to (1) European British subjects, (2) Native subjects, servants of the East India Company and (3) Native subjects everywhere in matters in which they have contracted to be amenable to the Supreme Court. It is clear that the learned Judge did not consider that clause 8 of the Letters Patent of the Supreme Court conferred

(1) (1870) 6, B.L.R., 392. (2) (1912) I.L.R. 39 Calc., 164.
(3) (1881) I.L.R. 7 Mad., 56.

general power over all persons within the territories subject to the Government of Madras. In *Rajah of Ramnad* v. *Seetharam Chetty*(1), the Court held that after this court had framed rules for the execution of its decrees on the Original Side, it had no power to issue a warrant of arrest to be executed beyond the limits of Madras. In *In re Judges of Supreme Court of Bombay*(2), which related to the jurisdiction of the Supreme Court to issue a writ of *habeas corpus* beyond the limits of Bombay, no judgment was delivered by the judicial committee of the Privy Council; but they made a report which was affirmed by His Majesty the King. The Committee reported that "the Supreme Court has no power or authority to issue a writ of *habeas corpus* to the gaoler or officer of a native Court [referring to a Court established by the East India Company] as such officer, the Supreme Court having no power to discharge persons imprisoned under the authority of a native court."

The precedents referred to above are in my opinion against the contention of the petitioner's counsel that the Supreme Court had jurisdiction to issue the writ on an officer of the East India Company acting judicially beyond the limits of Madras. It is not contended that the application could be supported under section 15 of 24 and 25 Vic., C. 104, the Charter Act, which lays down that the High Court shall have superintendence over all Courts which may be subject to its appellate jurisdiction. Assuming that the Divisional officer was a Court he can hardly be said to have been a Court subject to the appellate jurisdiction of this Court. Dr. Swaminadhan, the learned counsel for the petitioner argued that a Superior Court like this Court has inherent jurisdiction to issue a writ to quash all proceedings of a judicial nature wheresoever and by whomsoever held within the ambit of its jurisdiction. He cited no authority in support of this proposition. I am not prepared to accept it Our right of superintendence is confined to Courts subject to our appellate jurisdiction There may be judicial proceedings held by officers not subject to our appellate jurisdiction. Decisions as to the income-tax payable by a person are not subject to review by this Court. The jurisdiction of this Court is defined by the Charter Act and by the Letters Patent constituting the Court It will be entirely wrong in my opinion

(1) (1903) I.L.R., 26 Mad., 120 (2) (1829) 1, Knapp' Rep 1 at p. 58 [P C]

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to hold that there is any power vesting in this Court over all persons exercising judicial functions within the limits of the Presidency of Madras. I hold therefore on the first question that this Court has no jurisdiction to quash on return to a writ of *certiorari* the proceedings of the Divisional officer.

The second question is whether the Divisional officer's order dated 30th July 1910 can be taken to have been passed by him as a Court. In Criminal Revision Case No. 130 of 1900, Weir's Criminal Rulings, Volume 2, page 598, a Divisional officer made an order under section 476 of the Criminal Procedure Code apparently on a report by a Tahsildar before whom an alleged false statement was made in an enquiry before him as income-tax officer. It was held that in doing so he did not act as a court and the order was set aside by SUBRAMANIA AIYAR and SHEPPARD, JJ. It does not appear how the learned judges thought they had jurisdiction to interfere in the matter. Possibly they regarded the order as one purporting to be passed by an inferior Criminal Court, as this court's powers of revision are confined to orders passed by an inferior Criminal Court. Apparently the false statement was made before the Tahsildar who recorded it for the purpose of determining the assessment to be levied. The case is distinguishable from the present one where the statement was made in the course of the hearing of an appeal made by the petitioner against an order fixing the assessment. The determination of the assessment in the first instance may not be an act of a Court, although the assessing officer may have power to record statements. But an appeal against the assessment is dealt with by the Collector in the manner in which an appeal is disposed of by a Civil Court. He is bound to hear the appellant and has power to record evidence [see sections 28 and 37 of the Income-tax Act II of 1886]. In *In re Kalidas*(1), the Bombay High Court held that an Income-tax Collector determining appeals against the assessment was not a court and that the High Court had no power to interfere in revision with an order passed by him under section 476 of the Criminal Procedure Code. The Punjab Chief Court has held the contrary view. See *Emperor* v. *Rup Singh*(2), and the majority of the Chief Court of Sindh also has done so. See *Emperor* v. *Deumal*(3). What then is the test for

(1) (1906) 8, Bom. L.R., 477. (2) (1906) 3 Cr. L.J., 129.
(3) (1909) 10 Cr.L.J., 305.

deciding whether the Divisional officer acted as a Court or not? In *Naloo Patra* v. *Emperor*(1), the proceedings of a Deputy Collector under the Land Registration Act in an application for the registry of the applicant's name as proprietor were held to be proceedings of a court. The learned Judges HOLMWOOD and SHRAFFUDDIN, JJ., would appear to have held that the circumstance that the Collector had power to summon and enforce the attendance of witnesses and compel them to give evidence and also compel the production of documents went to show that he was to act as a Court. In *Queen-Empress* v. *Munda Shetti*(2), this Court held that a Tahsildar when holding an enquiry as to whether a transfer of names in a land register should be made or not is a Revenue Court. The Court observed that the Tahsildar "was authorised under Act III of 1869 . . . to receive evidence and to decide whether the transfer should be made or not. He was therefore, in our opinion, a tribunal empowered to deal with a particular matter and authorized to receive evidence bearing on that matter in order to enable him to arrive at a determination." I am of opinion that the test for deciding whether the Divisional officer was a Court or not has been correctly laid down in the last case. In *Rex* v. *Woodhouse*(3), the test adopted appears to be whether there was a *lis* before the officer. In my opinion there was a *lis* in this case. It is not necessary that there should be two parties arrayed as opponents in the matter to be decided by the officer. The petitioner had a right that he should not be made to pay a heavier tax than was properly assessable on his income. The officer had to decide as between the petitioner and Government what the petitioner's income was. He was bound to fix a day and place for the hearing of the petition (see section 26). It is immaterial that in the appeal the Government would not be named as a respondent. Suppose a trustee or a guardian of an infant makes an application to a Court for leave to sell certain properties of the beneficiary or the ward. There might not be any respondent in the application; yet it cannot be doubted that the order passed would be that of a Court. The petitioner was putting forward a right that his income should be assessed at a certain figure and the Government had equally a right that the

(1) (1911) I.L.R., 38 Calc., 368 (2) (1901) I.L.R., 24 Mad., 121.
(3) (1906) 2 K.B., 501 (C.A.)

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assessment should be fixed on the true income of the petitioner. I am of opinion, therefore, that the Divisional officer acted as a Court in deciding the income-tax appeal. I may observe that I am prepared to agree with Dr. Swaminadhan that mere authority to receive evidence would not make the officer recording it a Court.

With regard to the next question whether the petitioner should have appealed to the Revenue Board against the Divisional officer's order under section 476, I am of opinion that the learned Public Prosecutor's contention cannot be sustained. *Abdul Raoof* v. *King-Emperor*(1) no doubt appears to support it, but I am unable to agree with the view taken in that case. It is not pointed out under what provision of law the Revenue Board would have power to set aside the Divisional officer's order. I do not think that the mere fact that the Divisional officer was subordinate to the Revenue Board in the discharge of his functions as a Revenue officer generally could be taken to give any revisional jurisdiction to the Revenue Board. It might be that, if instead of acting under section 476, he had accorded sanction under section 195 of the Criminal Procedure Code, such an order could have been set aside by the Revenue Board as the authority to whom he was subject in the discharge of his functions as an Income-tax officer. But it does not follow that they had any jurisdiction to set aside an order passed under section 476. I cannot, therefore, hold that the objection to the petition on the ground that there was other remedy open to the petitioner can be sustained, if this Court would otherwise have the power to interfere by a writ of *certiorari* and if the Divisional officer did not act as a Court. The fourth and fifth questions are whether there was defect of jurisdiction in the Divisional officer on the ground that the order under section 476 was passed some considerable time after the close of the Income-tax proceedings. On this question there has been a conflict of judicial opinion. See *Aiyakannu Pillai* v. *Emperor*(2), *In re Chillashi Nanu Nair and others*(3), *In re Ramakristnamma*(4), *In re Ratna Pillay*(5) and *Riazul Hassan* v. *Emperor*(6). I consider it unnecessary to refer to the decisions of the other High

(1) (1907) 4 A.L.J., 701.
(2) (1909) I.L.R., 32 Mad., 49.
(3) (1909) 6 M.L.T., 92.
(4) (1910) 8 M.L.T., 81.
(5) (1911) 10 M.L.T., 333.
(6) (1909) 10 Cr. L.J., 525.

Courts. In *Aiyakannu Pillay* v. *Emperor*(1), the majority of the Full Bench of this Court were of opinion that a Court has no power to pass an order under that section except as a part of the proceedings in which the offence referred to in the section was committed or brought to its notice. At the same time there is weighty judicial opinion to the contrary. It may be that according to the opinion of the majority of the Full Bench in *Aiyakannu Pillai* v. *Emperor*(1), the illegality may be regarded as so serious as to entitle this Court to interfere in revision. But in my opinion it can hardly be said that the case is one of entire absence of jurisdiction in the Court passing the order. The Court has inherent jurisdiction under Procedure Code to pass the order. Taking it that it is bound to do so at a particular time, it is not easy to say that the passing of the order after the lapse of the time would be a ground for holding it to be made without jurisdiction. At any rate I do not think that this Court would be bound to quash the proceedings on account of a defect of jurisdiction of this character. We are not bound to interfere and quash the proceedings on *certiorari* even in cases where the defect can be said to be one of jurisdiction. The matter rests entirely on our discretion which will be exercised if the justice of the case demands our interference. Even if we have the power to interfere, I am of opinion that the case is not one in which we should quash the order of the Divisional officer.

I would therefore dismiss the petition.

SADASIVA AIYAR J :—In this case I have had the great advantage of having perused the exhaustive judgment of my learned brother. So far as the Revision Case No. 509 of 1911 is concerned I need say nothing more than that I agree with my learned brother for the reasons stated by him that that case ought to be dismissed. The other Criminal Petition No. 320 of 1911 which relates to the application under which a writ of *certiorari* has been issued involves several difficult questions of law on which I shall proceed to express my opinions at once.

As formulated in my learned brother's judgment the questions for decision are :—

1. Has this Court jurisdiction to issue a writ of *certiorari* on an officer beyond the limits of original jurisdiction?

(1) (1909) I.L.R. 32 Mad., 49.

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Divisional officer in this case was clearly a Revenue Court. Coming to the next question whether the petitioner had any other remedy against the order of the Divisional officer who purported to act under section 476 of the Criminal Procedure Code, I agree with my learned brother that the petitioner had none. As regards the next question as to whether the revenue officer's order was without jurisdiction because it was passed long after the close of the Income-tax proceedings, I think I am bound by the Full Bench Case in *Aiyakannu Pillai* v. *Emperor*(1). Though, if I may say so with respect, the reasoning in the dissentient judgments of MILLER, J., both in *Rahimadulla Sahib* v. *Emperor*(2) and *Aiyakannu Pillai* v. *Emperor*(1) have appealed more to my mind, as they have evidently appealed to the minds of BENSON and MUNRO, JJ., in the case of *Ramiya Naik*(3) and to the minds of the Judges who decided *In re Lakshmidas Lalji*(4). I think that till the legislature makes the point clear by amending the code I must follow *Aiyakannu Pillai* v. *Emperor*(1). On the fifth question whether this is a fit case for the exercise of our discretion to grant a writ of *certiorari*, assuming that we have jurisdiction to do so, the petitioner can take all objections as to the alleged illegality of the Divisional officer's action under section 476 before the Criminal Court which is trying him for the offence of perjury and I am not inclined to encourage technical objections which are merely intended to prevent the Courts from going into the merits of the question whether the petitioner did or did not commit perjury in the statements he gave before the Revenue Court. The only question remaining for disposal which I have reserved till the end as one of great difficulty is whether the High Court has got power to issue a writ of *certiorari* on an officer performing judicial duties in the moffussil. The statutes on this point have been referred to in the judgment of my learned brother and I do not intend to refer to all of them. That the High Court has inherited all the powers of the Supreme Court seems to be clear law. The Letters Patent of Supreme Court, clause 8, clearly says that the Chief Justice and the Puisne Judges have such jurisdiction and authority as "Our Justices to the King's Bench have and may lawfully exercise" within England, the jurisdiction of the Supreme Court to extend for

(1) (1909) I.L.R., 32 Mad., 49.
(2) (1908) I.L.R., 31 Mad., 140.
(3) Crl. M.P., 207 of 1907.
(4) (1908) I.L.R., 32 Bom., 184.

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this purpose throughout the settlement of Fort St. George and the town of Madras *and all the territories which now are or hereafter may be subject to or dependent* upon the Government of Madras. That the Court of King's Bench had the power to issue writs of *certiorari* over the whole of England cannot be denied. The Chief Justice and Judges of the High Court have therefore, in my opinion, clearly jurisdiction over the whole of Madras Presidency to issue writs of *certiorari*. The Court of King's Bench had similarly power to issue writs of *habeas corpus* over the whole of England and Mr. NORMAN J. in *In the Matter of Ameer Khan*(1) expressly bases the power of the High Court of Calcutta to issue writs of *habeas corpus* throughout Bengal even to persons in the moffussil on the ground that the High Court of Calcutta inherited all the powers of the Supreme Court of Calcutta under its Letters Patent which contained a similar provision to clause 8 of the Letters Patent of the Madras Supreme Court, had all the powers of the King's Bench in England over the whole of Bengal Both writs are high prerogative writs vested in the Court of King's Bench as representing the powers of the Crown to do justice in extraordinary cases and I see no reason to restrict the power to issue such writs of *certiorari* to persons within the original, civil and criminal jurisdiction of the Madras High Court if (as must be conceded) the writ of *habeas corpus* can issue into the moffussil also. I am unable to agree that the clause 8 of the Letters Patent gave the powers it gives to the Chief Justice and the Puisne Judges in their individual capacity and that it was not intended to give them powers as constituting the Supreme Court. The statute 39—40 George III, page 79, was intended to establish a Supreme Court of Judicature at Madras to consist of the like number of persons, etc., as the Supreme Court at Fort William and the Letters Patent were issued in order to establish the said Supreme Court of Judicature to consist of the Chief Justice and the Puisne Judges. The said Chief Justice and Puisne Judges were empowered to make rules for forming Courts made up of individual Judges or Bench of Judges as the case may be to hear particular matters within the jurisdiction of the Supreme Court. The writ of *habeas corpus* when it is issued by a single Judge or a Bench of Judges is issued because the Judge or Judges form the Court for that particular

(1) (1870) 6 Beng. L.R., 392.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

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but in that case, *Jamuna Bhai* v. *Sadagopa*(1), their Lordships did accept the argument of the Advocate-General that the jurisdiction of the Supreme Court was not merely territorial and they allowed property situate in Chingleput to be sold in execution of a decree passed by the Madras High Court on its Original Side. INNES, J., makes no reference to clause 8 of the Letters Patent of the Supreme Court, simply because it was not necessary to consider that clause at all for the purposes of that case, and I am unable to find any observation in that judgment which show that the learned Judge must have held that clause 8 to which, as I have already said, he makes no reference, conferred no power to issue writs of *habeas corpus* or *certiorari* directed to judicial bodies within the territories subject to the Government of Madras. The case *Rajah of Ramnad* v. *Seetharam Chetty*(2) depended upon the provisions of the Letters Patent of 1865 which expressly enacted that the ordinary original civil and criminal jurisdiction of the said High Court of Madras shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction and it had nothing to do with the right of the High Court as inheriting the powers which the Supreme Court had under clause 8 of its Letters Patent. We are considering this question not in the ordinary Original Civil side of the High Court and hence the restriction placed upon the Original Side of the High Court by the Letters Patent of 1865 and the rules framed by the High Court under the Letters Patent relating to transfer of Original Side decrees for execution have no bearing upon the consideration of the question before us *In re Judges of Supreme Court of Bombay*(3) *In the matter of James Pattle*(4) and *In the matter of Samuel Volumtim Foy*(5) all depend upon the question whether the Supreme Court had any kind of jurisdiction over the Courts established by the East India Company in the moffussil and the officers of the Company's Courts, the powers of the East India Company being regulated by their own special statutes and charters which gave them power to establish Court in the moffussil as regards the Company's subjects who were not even considered as British subjects owing direct allegiance to the Crown. British Laws did not run in the Company's moffussil territory. The

(1) (1884) I.L.R., 7 Mad., 56 at p. 59. (2) (1903) I.L.R., 26 Mad., 120.
(3) (1829) 1 Knapp's Rep. 1 (P.C). (4) (1836) 1 Ind. Decns. (old series), 828.
(5) (1850) 1 Taylor and Bell, 219.

Company obtained varying rights over scattered factories from various Native Princes and the Company's Courts countenanced slavery and the Company's native subjects in the moffussil were not even British subjects. Till direct allegiance to the Crown was established and the moffussil Courts became the Courts of the Crown just like the High Court instead of having been the Courts of the East India Company, the Supreme Court had clearly no right to issue writs of *certiorari* in respect of moffussil Courts which were practically Foreign Courts and over the officers of the moffussil Courts carrying out the orders of such Courts and that is the main ground on which those old cases were decided; clause 23 of the Letters Patent barring the Supreme Court's jurisdiction over Courts—the Company's Courts. As was said by Sir ELIJAH IMPEY in the Patna case in 1777: "In this country, the gross body of the people are not and only certain persons answering particular descriptions are objects of the King's Laws and of the jurisdiction of this Court" that is, the Supreme Court. But when all the people became subject to the King's Laws and the King's Courts instead of the Company's laws and Company's Courts, they must be entitled to invoke the King's prerogative vested in the Superior Courts for their protection.

In the result and after much anxious consideration, I have come to the conclusion that the power to issue the writ of *certiorari* to quash judicial proceedings passed by persons in the moffussil does belong to the High Court though of course the power should not be invoked except in very extraordinary cases I can well conceive of cases in which proceedings in the nature of judicial proceedings might be passed by an officer and these proceedings might be postponed by him to take effect at a future time when the person to be affected by such order may have to be absent from British India and could not therefore then take steps to prevent the execution of that order. In such a state of facts it might be necessary in the interests of justice to remove such order by a writ of "*certiorari* to quash" to the High Court and have it quashed to prevent irremediable injustice

As I agree with my learned brother on all the questions arising in this case except this rather academic though important question as to the powers of the High Court to issue writ of *certiorari* to quash and as the decision on the other four questions leads to the same conclusion as that which my learned brother has arrived at, I agree that this petition (320 of 1911) also like the petition No. 500 of 1911 should be dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1904. November 14.

In re K. RANGAN AND FORTY OTHERS (ACCUSED NOS. 1 TO 41), PETITIONERS.*

Criminal Procedure Code (Act V of 1898), sec. 110—'Any person within the local limits', meaning of—Jurisdiction of Magistrates over outsiders found within local limits—Object of the section.

In order to give jurisdiction to a Magistrate to proceed under section 110, Criminal Procedure Code, it is not necessary that the person proceeded against should be 'residing' within the local limits of his jurisdiction.

The meaning of the expression 'any person within the local limits' in section 110 is 'any person who is within the local limits at the time the magistrate takes action under the section.'

Ketabei v. Queen-Empress, [(1900) I.L.R., 27 Calc., 993], not followed.

A contrary view would defeat the object of the section, viz., prevention of crime, as then it would be impossible to deal under the section, with wandering gangs of criminals having no fixed residence or with habitual thieves or desperate characters belonging to foreign territories, who infest British India.

PETITION, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of R. D. BROADFOOT, the Sessions Judge of Chingleput, in Criminal Miscellaneous Case No. 12 of 1904, referred under section 123 (2), Criminal Procedure Code, by S. G. ROBERTS, the Joint Magistrate of Chingleput, in Criminal Miscellaneous Case No. 30 of 1904.

The facts of the case are set out in the order.

Messrs. *E. R. Osborne* and *K. Kuppusami Ayyar* for the petitioners.

The acting Public Prosecutor, *contra*.

ORDER.—It is urged by counsel for the petitioners that some of the persons who have been required to give security for good behaviour reside outside the jurisdiction of the Magistrate who took action under section 110, Criminal Procedure Code, and our attention is drawn to the case of *Ketaboi v. Queen-Empress*(1).

In that case it was held that, according to the true construction of section 110, the Magistrate would have no jurisdiction to deal with the case, unless the person proceeded against was "residing" within the local jurisdiction of the Magistrate.

With all respect to the learned Judges who decided that case, we are not prepared to follow their decision. The words of the section are "wherever . . . a Magistrate . . . receives

* Criminal Revision Case No. 355 of 1904.

(1) (1900) I.L.R., 27 Calc., 993.

Benson and Boddam, JJ.

In re Bangan.

information that any person within the local limits of his jurisdiction . . . is by habit a robber" and so forth, he may proceed under the section. Had the legislature intended to restrict the jurisdiction of the Magistrate to persons residing within his local jurisdiction, nothing would have been easier than to have said so; but the legislature has refrained from imposing this limitation, and we are not justified in importing it into the law. The law simply says "any person within the local limits" and this we understand to mean any person who is within the local limits at the time when the Magistrate takes action under the section. The object ot the section is the prevention of crime, and its object would, in our opinion, be liable to be defeated if its scope were restricted to persons residing within the Magistrate's jurisdiction. As the Sessions Judge points out if that were so, we should have this absurdity that the Magistrates in British India would have no power to proceed under the section against bad characters, no matter how desperate and dangerous they might be, who reside in French or other foreign territory, though they might infest villages in British India, and be well known to the authorities as habitual thieves; nor would any Magistrate have power to proceed against those gangs of criminals who have no residence any where but wander from district to district throughout the year.

We dismiss the petition.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

1910. October 8. November 21.

RAMASAMI CHETTI (Twelfth Defendant), Appellant,

v.

PONNA PADAYACHI and fifteen others (Plaintiffs Nos. 1 to 3, and Defendants Nos. 1 to 11, 13 and 14), Respondents.*

Adverse possession—Hypothecation—Stranger in adverse possession for 12 years as against mortgagor, effect of, on mortgagee's rights—Payments of interest and acknowledgment by mortgagor, effect of.

Adverse possession by a stranger for more than 12 years of a property, which is subject to a hypothecation, not only extinguishes the rights of the

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* Second Appeal No. 1659 of 1909.

[*N.B.*—This case is dissented from *Parthasarathy Naikan* v. *Lakshmana Naikan*, Second Appeal No. 844 of 1907, reported in (1911) 21 M.L.J., 467-Ed.]

ABDUR RAHIM AND AYLING, JJ.

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mortgagor but bars also those of the mortgagee, though the rights of the mortgagee may have been kept alive by payments or acknowledgments made by the mortgagor.

Prannath Roy Chowdry v. *Rookea Begum*, [(1859) 7 M.I.A., 323 at p. 355], *Karan Singh* v. *Bakar Ali Khan*, [(1883) I.L.R., 5 All., 1 (P.C.)], *Ammu* v. *Ramakrishna Sastri*, [(1879) I.L.R., 2 Mad., 226 at p. 229], *Ram Coomarsein* v. *Prosunno Coomarsein*, [(1864) 1 W.R., 375], and *Showcumber Sahoo* v. *Bheanseden Kulwar*, [(1870) 2 N.W.P. H.C.R., 223], followed.

Aimadar Mandal v. *Makhan Lal Day*, [(1906) I.L.R., 33 Calc., 1015, and Second Appeal No. 682 of 1909 (unreported)], not followed.

Heath v. *Pugh*, [(1881) L.R., 6 Q.B.D., 345], and on appeal *Pugh* v. *Heath*, [(1882) L.R., 7 A.C., 235], distinguished.

Per curiam.—The rights of the mortgagee would be extinguished in such a case even where he is not entitled to possession under the mortgage, as the mortgagee is not without remedy against the trespasser and could protect his interests by proper proceedings.

A mortgage is merely a security for the debt and the mortgagee's right is to sell the interest of the mortgagor in the land and a mortgage decree under which the land is attempted to be sold cannot bind persons who do not derive their title from the mortgagor and were not parties to the suit in which the mortgage decree was passed but claim a statutory title adversely to the mortgagor.

SECOND APPEAL against the decree of H. MOBERLY, the District Judge of South Arcot, in Appeal Suit No. 29 of 1909, presented against the decree of C. V. VISVANATHA SASTRI, the District Munsif of Panruti, in Original Suit No 134 of 1908.

The first and thirteenth defendants hypothecated lands Nos. 3 and 4 in the suit in the year 1890, to the twelfth defendant. The twelfth defendant brought a suit (Original Suit No. 292 of 1898) for sale of the mortgaged properties against the mortgagors only and obtained a decree for sale and when he attempted to sell the mortgaged lands in 1907 the plaintiffs who claimed title to the same by purchase from the first defendant's brother, whom, they alleged to be the owner brought this suit for a declaration of their rights as against the mortgagors and the mortgagee (first, twelfth and thirteenth defendants). Plaintiffs alleged that the properties in suit fell to the share of the first defendant's brother at a partition between him and the first defendant, which took place twenty four years before the suit and that the first and thirteenth defendants had no title to mortgage the same in 1890. The District Munsif, holding that the partition as alleged was proved and that the mortgagors had no title, decreed the suit. On appeal, the District Judge, without giving a definite finding on the questions of partition and title of the mortgagors, confirmed the decree holding that the plaintiffs and their predecessors in title

were in adverse possession of the lands for more than twelve years (*i.e.*, since 1894) and that the title of the mortgagors, if any, was thus extinguished.

The twelfth defendant, the mortgagee, appealed.

The arguments urged and the cases quoted on both sides appear fully from the judgment.

T. Rangachariar for the appellant.

K. R. Subramania Sastriar for the respondents (Nos. 1 to 3).

ABDUR RAHIM, J.—This appeal is by the 12th defendant in a suit, the object of which was to have it declared that certain lands (marked 3 and 4 on the plan) belong to the plaintiffs and were not liable to be sold in execution of a decree obtained by the 12th defendant, against the 1st defendant in Original Suit No. 292 of 1898 on a simple mortgage bond executed by the latter in favour of the former in 1890. The Munsif found, on the question of the plaintiffs' title, that the lands, which were originally the joint property of the 1st and 8th defendants and their two brothers, Chinnatambi and Muthukannu, fell to the share of the two latter at a partition effected between them about 24 years before the institution of the suit and long prior to the mortgage by the 1st defendant to the 12th defendant. The District Judge's finding on this point, such as it is, cannot be said to be satisfactory, but he has dismissed the appeal preferred by the 12th defendant against the decree of the Munsif, which was in favour of the plaintiffs, holding, in effect, that the 1st and 13th defendants (the 13th defendant had also joined in the execution of the mortgage) not having been in possession of the land as the evidence showed since 1894 for a period of more than 12 years before the attempt of the 12th defendant to bring the property to sale in execution of his mortgage decree, and the plaintiffs' predecessors in title and the plaintiffs having been all this time in adverse possession of the property, the rights of the 1st defendant and 13th defendant in the property, if they had any, became extinguished and the property could not therefore be sold in execution of the mortgage decree obtained against them by the 12th defendant. If this view of the learned Judge be correct, there would be no necessity to remit the case to him for a proper determination of the question relating to partition. Mr. T. Ranga Chariar, who appeared before us for the appellant (12th defendant) has not disputed the finding of the District Judge as to the duration and character of possession of the plaintiffs

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and their predecessors in title; and, in answer to a question which I put to him in the course of the argument, Mr. Ranga Chariar stated that he would accept the finding on the point to mean that the plaintiffs' predecessors in title and the plaintiffs intended to prescribe for an absolute title, and not merely for a title subject to the rights of the 12th defendant as mortgagee. His contention is that, though the rights of the mortgagor in the mortgaged property may be extinguished by adverse possession by a person for 12 years after the execution of the mortgage, yet, in no case, would the mortgagee's remedy against the mortgaged property be lost if his right to enforce the mortgage against the mortgagor is not barred, for instance, when it has been kept alive by payment of interest or acknowledgment. He relies for authority on *Aimadar Mandal* v. *Makhan Lal Day*(1) which has been followed by MUNRO and KRISHNASWAMI AYYAR, JJ., in Second Appeal No. 682 of 1909 without, as far as it appears, any further discussion of the question; and, if these decisions are right, Mr. Ranga Chariar's contention must prevail. I am, however, unable to take the view of the law expressed in those cases. MACLEAN, C.J., who delivered the judgment of the Court in the Calcutta case, thinks that the proposition, which he lays down, namely, that it is only when a mortgagee buys the mortgaged property on its being sold under the decree that time begins to run against him because, prior to that, he had no title to the property and the decree and sale gave him a new right, is supported by *Heath* v. *Pugh*(2) and *Pugh* v. *Heath*(3). But, with all respect to the learned judge, I do not find anything in that case, either in the judgment of the Court of Appeal delivered by Lord SELBORNE, L.C., or in the judgment delivered in the House of Lords, from which such a proposition can be deduced as being applicable to a case in which the person sought to be ejected does not hold the property under a title derived from the mortgagor. *Heath* v. *Pugh*(2) was not a case of adverse possession at all; there the mortgagee, who had the legal estate in the mortgaged property vested in him, brought a suit for foreclosure impleading that in that suit the defendant who had purchased the equity of redemption from the mortgagor (who held the property in trust, or from one of them), subsequent to the mortgage and obtained a decree within

(1) (1906) I.L.R., 33 Calc., 1015. (2) (1881) 6 Q.B.D., 345.
(3) (1882) 7 A.C., 235.

the time allowed by the statute, but when he instituted a suit to recover possession 12 years had elapsed from the date of the mortgage and he was met by the plea that the suit was barred under 3 and 4 William IV, Cap. 27. The Court of Appeal held that the decree for foreclosure gave the mortgagee a new right against the defendant, who, it is to be observed, was a party to the suit for foreclosure and that time would count only from the date of the decree. The defendant in that case derived his title from the mortgagor who was in possession and not by adverse possession and the decision proceeded on the reasoning that until foreclosure the mortgage was merely a security for the debt, that although the legal estate had been conveyed to the mortgagee (which, it may be noted, is not the case here), the interest in the land itself remained in the mortgagor, the equity of redemption being an estate in the land, that the order of foreclosure vested the ownership for the first time in the mortgagee as if by a new purchase and that, though the mortgagee might have claimed possession by virtue of the legal estate conveyed to him under the mortgage, yet "there can be no two things more distinct or opposite than possession as mortgagee and possession as owner of the estate." The entire argument treats the position of the defendant as in no way distinct from that of the mortgagor and it could not be contended in that case that it would be otherwise. In *Prannath Roy Chowdry* v. *Rookea Begum*(1), it is laid down that "where a mortgage is subject by law to be foreclosed, the title to foreclose is in the nature of a limit to the title to redeem. It by no means follows, as a consequence, that the mortgagee foreclosing will be able, in a suit for possession, to make good against all occupants a title to possession." It is clear that a mortgagee who has obtained a decree for sale will not be in a better position than a mortgagee foreclosing.

Now, if we were to apply the arguments of Lord SELBORNE in *Heath* v. *Pugh*(2) to a case like this and *Amadar Mandal* v. *Makhan Lal Day*(3), it seems to me that the conclusion, in a case where the mortgaged property has been in peaceable possession of a stranger for more than the statutory period, must be the opposite of that reached in *Heath* v. *Pugh*(2). A person, who is in adverse possession of land for 12 years, acquires a title to the land, the rights of the owner of the land being

(1) (1859) 7 M.I.A., 323, at p. 355. (2) (1881) 6 Q.B.D., [illegible].
(3) (1906) I.L.R., 33 Calc., 1015.

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extinguished, and, since a mortgage is merely a security for the debt and the interest in the land remained in the mortgagor, it is difficult to see how the existence of the mortgage at the time adverse possession commenced can prevent the person in such possession acquiring the ownership of the land. It is conceded that the interest of the mortgagor in the land would be extinguished but it is contended that the title by prescription must be subject to the liability of the land being sold for payment of the anterior mortgage debt. The mortgagee's right is to sell the interest of the mortgagor in the land and the mortgage decree, under which the land is attempted to be sold, cannot bind persons who do not derive their title from the mortgagor and were not parties to the suit in which the mortgage decree was passed but claim a statutory title adversely to the mortgagor. There may be cases in which a person claiming to have acquired a title by prescription would acquire it subject to the existing mortgage but that would depend upon whether the person in possession intended to acquire an absolute title or only a title subject to the rights of the mortgagee. This is laid down in clear language by TURNER, C.J., and MUTTUSAMI AIYAR, J., in *Ammu* v. *Ramakrishna Sastri*(1) where they observe: "But there are other cases in which the rights and interests of the mortgagor and mortgagee are equally invaded, *e.g.*, when under a sale for arrears of revenue a purchaser acquires possession and thenceforward holds adversely both to the mortgagor and mortgagee, or *when the mortgagor has remained in possession and a stranger ousts him from the lands.*" The latter portion of the passage applies exactly to the present case. In the case of *Ammu* v. *Ramakrishna Sastri*(1) the suit was brought for redemption and it was held that the claim against the defendant who was in possession but did not claim under the mortgagee was barred under article 145 and article 148 had no application to the case. The decision in *Ram Coomar Sein* v. *Prosunno Coomar Sein*(2) went even further, so far as the position of a person who has dispossessed the mortgagor is concerned. There it was held, relying on *Prannath Roy Chowdry* v. *Rookea Begum*(3) that, though there may be cases in which the possession of a person who does not derive his title from the mortgagor may be adverse to the mortgagor but still not adverse to the mortgagee, yet, where the mortgagor is dispossessed and his title disputed and another

(1) (1879) I.L.R., 2 Mad., 226, at p. 229. (2) (1864) 1 W.R., 375.
(3) (1859) 7 M.I.A., 323, at p. 356.

person obtains possession of the estate, the possession of the new holder becomes adverse to both the mortgagor and the mortgagee and the mortgagee's cause of action arises against the new holder on the date on which the latter obtained such adverse possession of the mortgaged estate. To the same effect was the law laid down in *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar*(1), namely, that a mortgagee is bound to come in within 12 years to vindicate his title to the land against a third party in adverse possession who does not claim under the mortgagor. Here I would observe that these two cases make it clear that the mortgagee is not without remedy against a trespasser taking possession of the mortgaged land, although it may be that he is not entitled to possession under his mortgage, and I myself do not see any valid reason why the mortgagee should not be able under such circumstances to protect his interests by proper proceedings. On the other hand, no authority has been cited to us in support of the proposition to the contrary on which is based one of the grounds for the decision in *Amadar Mandal* v. *Makhan Lal Day*(2).

I am further of opinion, although the learned Judges who decided the Calcutta case thought otherwise, that the point is really covered by what is laid down by the Privy Council in *Karan Singh* v. *Bakar Ali Khan*(3). The facts of the Privy Council case are substantially the same, so far as they affect the question now raised, as those of the present case. There the suit was instituted by the holders of certain mortgage bonds to recover the sum due and the plaintiff further claimed to enforce payment of the sum due under the bonds by sale of the mortgaged property. Their Lordships were of opinion that the claim to sell the property would have been barred under article 145 of the Limitation Act of 1871—article 144 of the Limitation Act of 1877 by which the case is governed, is to the same effect,—if it were proved that the defendant, who set up a title distinct from that of the mortgagors, had been in adverse possession for more than 12 years before the institution of the suit. Their Lordships treated the suit as one *for possession of immoveable property or an interest in immoveable property*. I may also observe that, if the argument of the appellant were to prevail, the result would be that when a property is

(1) (1870) 2 N.W.P.H.C.R., 223. (2) (1906) I.L.R., 33 Calc., 1015.
(3) (1883) I.L.R., 5 All., 1 [P.C.].

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under mortgage and the mortgagor or his successor in interest goes on paying interest on the debt or otherwise acknowledges his liability, persons in peaceable and unchallenged possession and enjoyment of such property in assertion of their own rights, whatever the length of time during which their possession and enjoyment might have lasted, would not be secure in their title. I am of opinion that the weight of authority, as well as reason, is against the contention of the appellant and the appeal must be dismissed with costs.

AYLING, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. March 30. April 7.

H. VYDIANATHA AIYAR (COUNTER-PETITIONER), APPELLANT,

v.

K. SUBRAMANIA PATTER (PETITIONER), RESPONDENT.*

Limitation Act (IX of 1908), art. 182—Part of a decree containing unascertained amount—Execution of whole decree three years after ascertainment—No bar—Policy of Limitation Act as to period of limitation for execution of decrees.

For the purposes of limitation regarding execution of a decree, the decree must be taken as a whole and ordinarily when a portion of the decree is not executable by reason of the fact that the amount due under that portion is left to be determined at a future time, limitation begins to run as regards execution of the whole decree only from the time of ascertainment of the amount left undetermined, even though it might have been open to the party to have executed the other portions earlier.

Haji Ashfaq Husain v. *Lala Gauri Sahai*, (1911) 13 C.L.J., 351; (S.C.), (1911) I.L.R., 33 All., 264 (P.C.). *Ratnachalam Ayyar* v. *Venkatrama Ayyar*, (1906) I.L.R., 29 Mad., 46 and *Krishnan* v. *Nilakandan*, (1885) I.L.R., 8 Mad., 137, followed.

Gopal Chunder Manna v. *Gosain Dass Kalay*, (1898) I.L.R., 25 Calc., 594 (F.B.); *Krishnama Chariar* v. *Mangammal*, (1903) I.L.R., 26 Mad., 91. (F.B.); *Abdul Rahiman* v. *Maidin Saiba*, (1898) I.L.R., 22 Bom., 500 and *Gauri Sahai* v. *Ashfaq Husain*, (1907) I.L.R., 29 All., 623, applied.

Subramanya Chettiar v. *Alagappa Chettiar*, (1907) I.L.R., 30 Mad., 268, and *Nepal Chandra Sadookhan* v. *Amrita Lall Sadookhan*, (1899) I.L.R., 26 Calc., 888 referred to.

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* Appeal Against Appellate Order No. 38 of 1910

BENSON AND SUNDARA AYYAR, JJ.

VYDIANATHA AIYAR v. SUBRAMANIA PATTER.

C.M.A. No. 74 of 1903 (unreported), not followed.

A decree in a second appeal, dated 30th July 1906, was as follows.—

"Appellant (defendant) do pay respondent (plaintiff) Rs. 64-11-4 for his costs in this second appeal, Rs. 78-3-7 for his costs in the memorandum of objections and also his costs in the lower Appellate Court which will be ascertained and taxed by that Court" The costs in the lower Appellate Court were ascertained by that Court on 1st December 1906. The application for the execution of the whole decree was made on 7th August 1909, i.e., more than three years after the decree in Second Appeal but within three years after ascertainment by the lower Appellate Court:

Held, that the execution of the decree was not barred.

The policy of the Limitation Act in the case of execution of decrees is to lay down a simple rule and to treat the decree as a whole except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times.

Per Curiam.—Under article 182, there is only a single starting point, where there has been an appeal, review or amendment, although it might be open for a decree-holder to apply for the execution of a part of the decree before proceedings in appeal, review or amendment have terminated

APPEAL against the order of K. IMBICHUNNI NAIR, the Subordinate Judge of South Malabar at Palghat, dated the 21st day of December 1909, in Appeal Suit No. 809 of 1909, presented against the order of U. GOVINDAN NAIR, the District Munsif of Chowghat, in Miscellaneous Petition No. 2022 of 1909 (in Original Suit No. 701 of 1901).

The facts of this case are set out in the judgment.

C. V. Ananthakrishna Ayyar for the appellant.

T. K. Govinda Ayyar for the respondent.

JUDGMENT.—The question in this case is whether the execution of the decree in S.A. No. 915 of 1903 of this Court is barred by limitation. The decree which was dated the 30th July 1906 provided that the appellant in the Second Appeal (defendant) should pay the respondent (plaintiff) "Rs 64-11-4 for his costs in this second appeal, Rs. 78-3-7 for his costs in the memorandum of objections and also his costs in the lower Appellate Court which will be ascertained and taxed by that Court" The costs in the lower Appellate Court were ascertained by that Court on the 1st December 1906. The application for the execution of the whole decree was presented on the 7th August 1909, that is, more than three years from the date of the High Court decree in S.A. No. 915 of 1903, but within three years after the date of the ascertainment of the costs of the lower Appellate Court by that Court. The District Munsif held that the application for execution was

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barred except with regard to the costs of the lower Appellate Court. The Subordinate Judge modified his order and held that no portion of the decree was barred by limitation.

It is conceded that so far as it related to the costs of the lower Appellate Court, the execution was not barred as the decree with respect to that portion became complete only within three years of the date of the application. But it is contended by the appellant that the rest of the decree is barred as execution could have been applied for with respect to it immediately after the date of the decree of this Court in Second Appeal. After careful consideration we have come to the conclusion that the decision of the lower Appellate Court is right. Article 182 of the Limitation Act prescribes the rule of limitation with respect to execution of decrees. The starting point is mentioned in the third column. Where an appeal is preferred from a decree or a review of judgment or amendment of the decree is applied for, limitation runs with respect to the execution of the whole decree only when the proceedings in appeal, review or amendment come to an end. This shows that the intention of the legislature is to treat the decree as a whole although only a part, sometimes a very small part, may be the subject of an appeal, or an application for review of judgment or amendment of decree. Different starting points for portions of a decree against the same defendant seem to be contemplated only in the case where the decree directs payments to be made on certain dates, in which case limitation will run for the enforcement of each payment from the date when it is directed by the decree to be made. Although the language of clauses 2, 3 and 4 might possibly be capable of a different construction, it is now fully established by judicial decisions that there is only a single starting point where there has been an appeal, review or amendment although it might be open in some of the cases falling within their purview for the decree-holder to apply for the execution of a part of the decree before the proceedings in appeal, review or amendment have terminated. See *Gopal Chunder Manna* v. *Gosain Das Kalay*(1), *Krishnama Chariar* v. *Mangammal*(2), *Abdul Rahiman* v. *Maidin Saiba*(3), and *Gauri Sahai* v. *Ashfaq Husain*(4). We think that in the present case also the decree must be taken as a whole for deciding the question of

(1) (1898) I.L.R., 25 Calc., 594 (F.B.). (2) (1903) I.L.R., 26 Mad., 91 (F.B.).
(3) (1898) I.L.R., 22 Bom., 500. (4) (1907) I.L.R., 29 All., 623.

limitation. If the direction were that the costs of the lower Appellate Court should be paid when ascertained by the Subordinate Court the case might be different. We are of opinion that the decree must be interpreted as one for the payment of a certain sum of money composed of three items, and one of these items, namely, the costs of the lower Appellate Court was not ascertained until the 1st December 1906. It was held in *Ratnachalam Ayyar* v *Venkatrama Ayyar*(1), that where a decree is for the payment of a sum of money to be thereafter ascertained, limitation would run only from the date of the ascertainment of the amount, a view which has been enunciated in several other cases [see also *Krishnan* v. *Nilakantan*(2)]. We are of opinion that the same rule should apply where a portion only of the amount decreed is left to be ascertained in future. It has also been decided that an application for execution of a portion of a decree or against some only of the judgment-debtors would give a fresh starting point for the execution of the whole decree See *Subramanya Chettiar* v. *Alagappa Chettiar*(3), and *Nepal Chandra Sadookhan* v. *Amrita Lall Sadhookhan*(4).

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Mr. Anantakrishna Aiyar for the appellant relies on two cases in support of his contention. The first of them, *Pryag Singh* v *Raju Singh*(5), does not really decide the question and need not be further considered. The other decision is a judgment of SUBRAMANIA AYYAR and BODDAM, JJ., in C.M.A. No. 74 of 1903. The decree in that case provided for the payment of costs and mesne profits, the mesne profits being left to be ascertained subsequently in execution. The application for execution was presented more than three years after the decree but within that period after the ascertainment of the mesne profits The learned Judges held that the application was barred with respect to the costs but not with regard to the mesne profits. The judgment with reference to execution for the costs is extremely brief and no reasons are given in support of it. With all deference to the learned Judges we are unable to follow the decision. The policy of the Limitation Act in the case of execution of decrees is in our opinion to lay down a simple rule and to treat the decree as a whole except when the decree itself directs that different portions of the relief granted are

(1) (1906) I.L.R., 29 Mad., 46.
(2) (1885) I.L.R., 8 Mad., 137.
(3) (1907) I.L.R., 30 Mad., 268
(4) (1889) I.L.R., 26 Calc., 888.
(5) (1898) I.L.R., 25 Calc., 203.

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to be rendered by the defendant to the decree-holder at different times. Our conclusion is in accordance with the decision of the Privy Council in *Haji Ashfaq Husain* v. *Lala Gauri Sahai*(1). We must therefore dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. April 28 and May 3.

SREE KRISHNA DOSS (DECREE-HOLDER), APPELLANT,

v.

ALUMBI AMMAL (JUDGMENT-DEBTOR), *RESPONDENT.**

Limitation Act (IX of 1908), art. 182—Execution of decree of Presidency Small Cause Court—Section 48, Civil Procedure Code (Act V of 1908) not applicable to such court—Transfer to City Civil Court for execution of a decree more than 12 years old—Art. 182 applicable—Section 48 applicable to City Civil Court, no bar.

Although a decree may be transferred by the court which passed it, to another court, for execution, the law of limitation applicable for its execution is that applicable to the decrees of the former court, *i.e.*, of the court which passed them.

A different rule will lead to anamolous consequences.

A decree of the Presidency Small Cause Court (Madras) passed in 1896 was transferred for execution to the City Civil Court. Section 48, Civil Procedure Code, not being applicable to the Court of Small Causes: *Held*, that an application for the execution presented to the City Civil Court in 1910 was not barred, the article applicable to the case being article 182 of the Limitation Act and that the fact that section 48, Civil Procedure Code, was applicable to the City Civil Court, was immaterial.

Sambasiva Mudaliar v. *Panchanada Pillai*, (1908) 17 M.L.J., 441; S C. (1908) I.L.R., 31 Mad., 24.

Tincowrie Dawn v. *Debendro Nath Mookerjee*, (1890) I.L.R., 17 Calc., 491, and *Jogemaya Dassi* v. *Thackomoni Dassi*, (1897) I.L.R., 24 Calc., 473 (F.B.), followed.

Her Highness Ruckmaboye v. *Lulloobhoy Mottichund*, (1852) 5 M.I.A., 234, not applicable.

Per Curiam.—A transfer of a decree by the court which passed it to another court does not make the decree one passed by the latter Court. Even after transfer, the control of the execution is still left, in several respects, in the hands of the court which passed the decree (*e.g.*) recognition of assignment, application for execution against legal representative, stay of execution, issuing precepts and certificate of non-execution or partial execution, etc.

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(1) (1911) 13 Calc. L.J., 351.

* Appeal Against Order No. 114 of 1910.

SUNDARA AYYAR AND AYLING, JJ.

SREE KRISHNA DOSS v. ALUMBI AMMAL.

APPEAL against the order of C. R. TIRUVENKATA CHARIAR, the Acting City Civil Judge, Madras, dated the 22nd day of April 1910, in Execution Petition No. 148 of 1910 in Small Cause Suit No. 10481 of 1896 on the file of M. O. PARTHASARATHY IYENGAR, a Judge of the Court of Small Causes, Madras.

The facts and arguments sufficiently appear from the judgment.

Joseph Satya Nadar for the appellant.

G. Devasagayam Pillai for the respondent.

JUDGMENT.—The question in this case is whether an application for execution of a decree of the Small Cause Court presented to the City Civil Court, to which it had been transmitted for execution, was rightly held by that court to be barred by limitation under section 48 of the Civil Procedure Code. It is conceded that under article 182 of the Limitation Act which is applicable to the Small Cause Court the application was not barred. Section 48 of the Civil Procedure Code enacts that "where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from the date of the decree sought to be executed." This section is not applicable to any suit or proceeding in the Presidency Small Cause Court. The learned Judge of the City Civil Court holds that the law of limitation being a law relating to procedure, section 48, which is applicable to the City Civil Court must govern the case and the application must therefore be held to be barred, and he relies upon the decision of the Privy Council in *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*(1) in support of his view. In that case the Privy Council held in 1851, that is before the enactment of the Limitation Act of 1859 in this country, that the English Statutes of Limitation were applicable to suits in the Presidency Town of Bombay as they had long been adopted and acted upon there. We do not think that the decision has any real bearing on this case. It is no doubt true that for some purposes limitation is a branch of the law of Procedure. It would be so when questions of private international law have to be decided and a court has to settle the law of which State should be applied where

(1) (1852) 5 M.I.A., 234.

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there is a conflict of law. But for a long time the Indian legislature has passed different statutes for regulating the manner in which suits and appeals are to be tried and for determining the rules of limitation applicable to them. The question before us must be decided with reference to the Statute of Limitation. Different rules have been enacted for the execution of decrees passed respectively by the High Courts and by all other courts and these a not affected by the court in which execution is actually taken out.

Thus in *Tincowrie Dawn* v. *Debendro Nath Mookerjee*(1) the Calcutta High Court held that when the execution of a decree of the Calcutta Small Cause Court was transferred to the High Court of Calcutta the limitation applicable to it was governed by article 179 and not by article 180 of Act XV of 1877. WILSON, J., who decided the case, points out that while the old Procedure Code, Act VIII of 1859, provided that the copy of a decree transmitted to a court for execution should have the effect of a *decree of that court*, sections 227 and 228 of Act XIV of 1882 laid down only directions as to the manner of execution and did not make the decree *one passed by* the court to which it is sent for execution. The same view was held by a Full Bench of the same court in *Jogemaya Dassi* v. *Thackomoni Dassi*(2). In *Sambasiva Mudaliar* v. *Panchanada Pillai*(3) the learned Chief Justice and Mr. Justice MILLER held that article 179 was not applicable to an application for possession by a purchaser of immoveable property at a revenue sale by executing the certificate obtained by him under section 36 of the Revenue Recovery Act. The learned Judges followed the rulings of the Calcutta High Court referred to above.

Column 1 of article 182 of the Limitation Act states that it is applicable to "the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908." There can be no doubt that the exception relating to article 183, makes the Court which passed the decree the test for determining the limitation for execution as that article itself shows whichever Court may be executing the decree. In our opinion the exception relating to section 48 of the Civil

(1) (1890) I.L.R., 17 Calc., 491. (2) (1897) I.L.R., 24 Calc., 473.
(3) (1907) 17 M.L.J., 441.

Procedure Code should also naturally be understood as applicable to decrees passed by the Courts to which that section is applicable. Although a decree may be transferred by the Court which passed it to another Court for execution, the control of the execution is still left in several respects in the hands of the former Court. Thus every application for execution by an assignee of a decree must be made to the Court which passed the decree and the right to grant execution or to refuse it rests with that Court (order XXI, rule 16). An application for execution against the legal representatives of a deceased judgment-debtor has to be made to that Court (section 50). Orders for the stay of execution can be passed only by the Court passing the decree (order XXI, rule 26); only that Court again could under section 257-A (now repealed) of the Code of 1882 sanction agreements giving time for the satisfaction of a judgment-debt or providing for the payment of a sum in excess of the sum due under a decree.

Order XXI, rule 28, provides that any order of the Court by which the decree is passed in relation to the execution of such decree shall be binding upon the Court to which the decree is sent for execution. Section 46 of the present Code entitles the Court passing a decree to issue a precept to any other Court competent to execute the decree to attach any property belonging to the judgment-debtor which the latter Court is bound to obey. Section 41 requires the Court to which a decree is transmitted for execution to certify to the Court which passed it "the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure." These provisions seem clearly to show that though the execution may be actually carried on by a different Court, the Court passing the decree has a large measure of control over the execution Besides, to hold that the Court executing the decree may apply a rule of limitation differing from that applicable to a decree of the Court transmitting it when the latter itself is executing it would lead to anamolous consequences. For instance, suppose a decree of a moffussil Court is sent up to the Presidency Small Cause Court for execution but before execution is granted, the twelve years' period provided for by section 48 of the Civil Procedure Code expires. Would it be reasonable to hold that the decree holder would acquire extension of the period within which he might obtain execution by getting the execution transferred to the Presidency Small Cause Court? In this very case it would still

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be open to the Small Cause Court itself to continue the execution of the decree. Further execution might be transferred from the Presidency Small Cause Court to the City Civil Court for reasons other than the absence of assets in the shape of moveable property available to the decree-holder for execution. The result of upholding the view of the lower Court would be to hold that execution against moveable property could be had in one Court and not in the other. There will also be difficulties in the application of the rule providing for execution in cases of cross-decrees under order XXI, rule 18. Suppose that *A* and *B* have cross-decrees against each other, *A*'s decree being passed by the Small Cause Court and *B*'s by the City Civil Court and that *B*'s execution would be barred by limitation if section 48 were applied; the consequence in such a case would be that if both decrees be produced in the Small Cause Court, *B* would get the benefit of rule 18 while if both were produced in the City Civil Court he would not, a result which would lead to wrangling between the parties for getting the execution into the hands of the Court which would be favourable to each of them.

We are of opinion that, under article 182 of the Limitation Act, the execution of the decree in the present case is not barred by limitation. We, therefore, reverse the order of the City Civil Court and remand the application for execution to it for disposal according to law.

The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

THE MUNICIPAL COUNCIL, KUMBAKONAM (PLAINTIFF), PETITIONER,

1911. July 19, 20 and 26.

v.

ABBAHS SAHIB (DEFENDANT), RESPONDENT.*

Madras District Municipalities Act (IV of 1884), sec. 191—No right to farm slaughtering fees—Contract of farming such fees, void and unenforceable—Contract Act, ss. 11 and 23—Powers of Corporations to contract.

Farming out, by a municipality, of its right to collect fees on the slaughter of animals, which the municipality is entitled to levy under section 191 of Madras District Municipalities Act (IV of 1884), is unauthorized and *ultra vires*. A contract of lease which has the effect of farming out such a right is void and unenforceable under sections 11 and 23 of the Contract Act (IX of 1872) as being beyond the competency of the Municipal Corporation to enter into, and therefore prohibited.

Held that any amount due to the municipality under such a contract cannot be recovered.

Decision of WALLIS, J., in *The Corporation of Madras* v. *Musthan Sait* [C S. No. 244 of 1907; (S O.) (1909) 21 M.L.J., 788] and *Marudamuthu Pillai* v. *Rangasami Mooppan*, [(1901) I.L R., 24 Mad., 401], applied Halsbury's Laws of England, Vol. VIII, Art. 805, Corporation's Title referred to.

Abdulla v. *Mammod*, [(1903) I.L R., 26 Mad., 156], distinguished

Per curiam.—The right of farming out is not necessary to the exercise of the right of levying; as such fees may be naturally and easily collected by municipal subordinates.

The fact that there is an express power to farm out tolls negatives an implied power to farm out other kinds of fees.

The fact that the Municipal Account Code contains provisions for the farming out of slaughtering fees and other taxes besides tolls is no guide to the interpretation of the Act in this respect.

Quære.—Whether section 11 of the Contract Act is not exhaustive and does not deal with the competency of a Corporation to contract?

PETITION under section 25 of Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of T. SAMI AYYAR, the Subordinate Judge of Kumbakōnam, dated the 5th November 1909, in Small Cause Suit No. 932 of 1906.

The facts of the case are set out in the judgment.

K. Ramachandrier for the petitioner.

S. Varadachari for *T. R. Venkatarama Sastri* for respondent.

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* Civil Revision Petition No. 121 of 1910.

AYLING AND SPENCER, JJ.

MUNICIPAL COUNCIL, KUMBAKONAM v. ABBAHS SAHIB.

JUDGMENT.—The petitioners, the Kumbakōnam Municipal Council, sued the respondent on the Small Cause side to recover the balance due by him under a lease which he had taken of the right to collect fees on the slaughter of animals, which the Council are entitled to levy under section 191 of the District Municipalities Act, Madras Act IV of 1884. The Subordinate Judge dismissed the suit on the ground that the Council was not empowered to lease the right in question and that the contract sued on was illegal and could not be enforced. This is the decree which we are now asked to set aside on revision.

A case of a precisely similar character, though arising in the City of Madras turning on the legality of a Municipal Council leasing out the right of collecting slaughtering fees has been decided by WALLIS, J. (C.S. No. 244 of 1907); and although it was decided with reference to the provisions of the Madras City Municipal Act III of 1904 and not of the District Municipalities Act, yet the provisions in the two Acts in this respect run on so nearly identical lines that the reasoning of the learned Judge applies with equal force to the present case. Admittedly the District Municipalities Act does not expressly authorize the leasing or farming out of the right to collect slaughtering fees. Of the several taxes leviable under the Act the only one in respect to which such a provision is to be found is the case of municipal tolls (section 92). It is urged that such a power is granted by implication as a necessary incident to the right of levying. But in the first place it cannot be said that the right of farming out is in any way necessary to the exercise of the right of levying; such fees may be naturally and easily collected by municipal subordinates as has been done for a certain period in this very case. Secondly, the fact that there is an express grant of the power to farm out tolls, is difficult to reconcile with the idea that the authorisation to levy carries with it an implied power to farm out. The mere fact that the Municipal Account Code contains provisions for the farming out of slaughtering fees and other taxes besides tolls does not, in our opinion, throw any light on the interpretation of the Act in this respect. We must therefore hold that the farming out of the right to collect slaughtering fees is unauthorised by law, and is *ultra vires*.

Is the suit contract therefore void and unenforceable? We are forced to the conclusion that it is so, as infringing the

ATLING AND SPENCER, JJ. — MUNICIPAL COUNCIL, KUMBAKONAM v. ABBAHI SAHIB.

provisions of both section 11 and section 23 of the Indian Contract Act, IX of 1872. The powers of a corporation must be strictly construed and it is hardly too much to say that what is not permitted to such a body is forbidden. To quote from Halsbury's Laws of England, Vol. 8, Art. 805 :

"Where a Corporation is created by statute, its powers are limited and circumscribed by the statute creating it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation. What the statute does not expressly or impliedly authorise is to be taken to be prohibited. If, for instance, the subject-matter of a contract is beyond the scope of the constitution of the corporation, it is *ultra vires*, that is, it is beyond the powers of the corporation to make the contract, which is therefore void *ab initio* and cannot be ratified."

The above reasoning exactly covers the present case. It has been suggested that the provisions of the Indian Contract Act are not exhaustive and that section 11 which deals with competency to contract does not contemplate the case of a corporation. But even if this be so, the matter must be decided in the light of general principles of law as expounded in the passage quoted above, and the result is the same.

It is argued for the petitioners on the authority of *Abdulla* v. *Mammod*(1) that nevertheless the contract can be enforced against the defendant. In that case, BHASHYAM AYYANGAR, J., held that a sub-lease by a ferry renter, though prohibited by the terms of his lease and invalid against Government, might be valid as against the sub-lessee. The case is easily distinguishable on the ground that the sub-lessor in that case was a private person, and no question arose of the peculiarly fettered position of a statutory corporation. A contract which, like the suit contract, is void *ab initio* cannot be enforced. [Compare *Marudamuthu Pillai* v. *Rangasami Mooppan*(2).]

We must therefore hold that the suit contract was void and unenforceable and that the Subordinate Judge was right in dismissing the suit.

The petition is dismissed with costs.

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(1) (1903) I.L.R., 26 Mad., 156. (2) (1901) I.L.R., 24 Mad., 401.

ABDUR RAHIM AND AYLING, JJ.

NANJA PILLAI v. SIVABAGYATHACHI.

the daughters of the brother of a deceased Hindu widow's husband were held entitled to succeed to the deceased's stridhanam in preference to the claims of the adopted son of the deceased's sister's daughter, of the maternal uncle's adopted son and of the widow of the deceased's brother, *Gojabai* v. *Shrimant Shahajirao Maloji Raje Bhosle*(1) per JARDINE and TELANG, JJ., where the grandson of a co-widow was preferred to a nephew and co-widow, *Jagannath Prasad Gupta* v. *Runjit Singh*(2) per MACLEAN, C.J., and BANERJEE, J., where the contest was between the kinsmen of the deceased's husband and the kinsmen of her father and the former were held to be entitled to the succession, *Krishnai* v. *Shripati*(3) in which the right of the surviving co-widow who was in that case the nearest sapinda of the deceased's husband was recognised, *Bai Kesserbai* v. *Hunsraj Morarji*(4) where a co-widow was held entitled to succeed in preference to the husband's brother or husband's brother's son, *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*(5) where the rights of the collateral heirs of the husband was confirmed, and *Champat* v. *Shiba*(6) where the rights of a collateral relation who was the nearest sapinda of the deceased's husband was maintained against the brother of the deceased.

Turning to the commentators whose works are referred to as authorities in the South though of a secondary importance compared to the Mitakshara we find that Kamalakara expressly lays down with reference to cases like the present that 'nearness' is to be determined by the rule given in the Mitakshara in regard to the succession to the property of a male who died without male descendants and that consequently first the wife, *i.e.*, the rival wife of a deceased succeeds, next the daughter, *i.e.*, the *deceased's step-daughter*, etc. (see West and Buhler, page 518); and Smrithi Chandrika (see T. Krishnasami Iyer's Translation, Chapter IX, section III, verse 38) also holds that the issue of a rival wife takes the property of the step-mother when the latter leaves no progeny, husband or the like. The views of modern Hindu lawyers like Golab Chandra Sircar Sastri (see his Hindu Law, edition IV, page 461) and Jagendranath Bhatta Charya (see his Commentaries on Hindu Law, page 580), also favour the right of the deceased's step-daughter as against collateral relations of the husband. The

(1) (1893) I.L.R., 17 Bom., 114 at p. 117. (2) (1898) I.L.R., 25 Calc., 354 at p. 367.
(3) (1906) I.L.R., 30 Bom., 333. (4) (1906) I.L.R., 30 Bom., 431 (P.C.)
(5) (1866) 11 M.I.A., 139 at p. 175. (6) (1886) I.L.R., 8 All., 393.

learned vakil for the respondent further relied on Dr. Gurudas Bannerjee's book on 'The Law of Stridhana' but I have not been able to consult it.

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The learned pleader for the appellant on the other hand has not been able to refer us to anything which can be said to support his contention. In fact his argument was based on two general propositions which he would ask us to accept as propositions of universal and invariable application, viz., that sapindas of the same gotra or family are preferred to sapindas of a different gotra and that males should be preferred to females. Now none of these maxims, however useful they may be in other connections, can have any force in cases which are provided for by an express text of the Mitakshara, or in other words such cases must be recognised as exceptions to the rules. Otherwise, we should be setting at nought the rights of persons expressly recognised as heirs by the Mitakshara. This we are not at liberty to do and no sort of authority has been referred to by the appellants which countenances such a course as is suggested by them.

It is not necessary to consider the exact extent and applicability of those rules in such cases as are dealt with in *Lakshmanammal* v. *Tiruvengada*(1), *Mari* v. *Chinnammál*(2) and *Salemma* v. *Lutchmana Reddi*(3) as it is clear and not disputed before us that according to the Mitakshara the daughter as an heir is placed immediately after the male issue and the widow and before all collaterals.

The decree of the lower Appellate Court is therefore confirmed and the appeal is dismissed with costs.

AYLING, J.—I agree

(1) (1882) I.L.R., 5 Mad., 241. (2) (1885) I.L.R., 8 Mad., 107 at p. 127.
(3) (1898) I.L.R., 21 Mad., 100.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

1911, August 1, 2 and 8.

NATARAJA MUDALIAR (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL OF MAYAVARAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Right of suit—Madras District Municipalities Act (IV of 1884)—Election as Municipal Councillor—Declaration of its invalidity by Collector under rule 36 of Election Rules—Civil Courts, no jurisdiction to question in—"Appointed by election" in sec. 10—Meaning of "election."

An order of a Collector declaring the invalidity of an election of a candidate to a seat in a Municipal Council, passed under rule 36 of the Election Rules after enquiry and based on proper grounds (*i.e.*, those set forth in rule 35) and otherwise complying with the requirements of the Rules framed under section 250 of Madras Act IV of 1884 (District Municipalities Act) cannot be questioned in a civil suit; but is conclusive as far as the result of the election is concerned.

Bhaishankar v. *The Municipal Corporation of Bombay*, [(1907) I.L.R., 31 Bom., 604 at p. 609], followed.

Maxwell on Interpretation of Statutes, 4th Edn., p. 197, referred to.

Vijaya Rágava v. *The Secretary of State for India*, [(1884) I.L.R., 7 Mad., 466], *Sabhapat Singh* v. *Abdul Gaffur*, [(1897) I.L.R., 24 Calc., 107] and *Lalbhai* v. *The Municipal Commissioner of Bombay*, [(1909) I.L.R., 33 Bom., 334], distinguished.

Per curiam.—The status of a Municipal Councillor is the creation of section 10 of Act IV of 1884, and the creation is subject, *inter alia*, to the conditions imposed by the Election Rules framed by the Governor in Council under section 250 of the Act and invested by clause (3) with the force of law. One of these rules is rule 36, the election gives the candidate elected no vested status, as the election is liable to be declared invalid; an invalid election can confer no status whatever.

The words "appointed by election" in section 10 refer only to a valid election, *i.e.*, one which is not set aside under rule 36.

Semble.—If an order is passed without any enquiry at all or is based on grounds other than those set forth in rule 35 a suit would probably lie to set it aside as *ultra vires*.

A suit for damages in consequence of an invalid order and a suit for a declaration of the validity of an election and an injunction stand on very different footings though based on the same facts. The former may be decreed, while the latter may not.

SECOND APPEAL against the decree of F. D'P. OLDFIELD, the District Judge of Tanjore, in Appeal Suit No. 362 of 1908,

* Second Appeal No. 562 of 1909.

ATLING AND SPENCER, JJ.

NATARAJA MUDALIAR v. MUNICIPAL COUNCIL OF MAYAVARAM.

presented against the decree of T. A. NARASIMHACHARI, the District Munsif of Māyavaram, in Original Suit No. 232 of 1907.

The facts of this case are clearly set out in the judgment.

The Hon'ble Mr. *T. V. Seshagiri Ayyar* for the appellant.

S. Srinivasa Ayyangar for the first respondent.

The Government Pleader for the second respondent.

JUDGMENT.—The plaintiff (appellant) was a candidate for a seat on the Māyavaram Municipal Council, and, at an election, held on 13th December 1906, he secured the largest number of votes. An objection was preferred on the ground of bribery and corruption, and after an enquiry by the Divisional officer, the Collector passed an order under rule 36 of the Election Rules declaring the election invalid, and ordering a fresh election to be held.

The plaintiff then brought the present suit. He prayed (1) for a declaration that he had been duly elected and in consequence was entitled as such to exercise the rights and privileges of a councillor, (2) for an injunction restraining the Municipal Council from holding a fresh election.

His suit was dismissed in both courts The District Munsif held that the Collector's order could be questioned in a civil suit, such as the present one, but, on going into the merits, he held that the bribery was proved, that the Collector's order was a proper one and that the plaintiff was entitled to no relief. The District Judge dismissed the appeal on the sole ground that the Collector's order was final, as far as the result of the election was concerned and could not be questioned in a civil suit.

Before us, argument on both sides has been directed solely to the question of whether the order of a Collector under rule 36 above quoted can be questioned in a Civil Court, and, if so, on what grounds. The learned vakil for the appellant wished to raise a further point, whether the Election Rules themselves were not *ultra vires*. We have, however, felt ourselves bound to refuse to go into this point. It is not taken in the appeal memorandum; and the omission was admittedly deliberate in view of the decision in *Secretary of State for India* v *Venkatesalu Naidu*(1). The appellant's vakil states that he is now prepared to argue that this decision is wrong; but he has filed no memorandum of additional

(1) (1907) I.L.R., 30 Mad., 113.

ATLING AND SPENCER, JJ.

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grounds of appeal as required by the rules of this Court. We therefore refused leave to argue this point.

Coming then to the sole point for decision, we may say at once that we are in substantial accord with the views of the learned District Judge who has discussed the matter very fully and ably in his judgment. We do not understand him to mean (and we ourselves are not prepared to say), that under no circumstances whatever could a Collector's order purporting to be passed under rule 36 of the Election Rules be called in question in a Civil Court. If such an order had been passed without any enquiry at all, or were based on grounds other than those set forth in rule 35, a suit would probably lie to set it aside as *ultra vires*. But, where, as in the present case, the order appears to have been passed after compliance with all the requirements of the rules, and purports to be based on proper grounds, we agree with the District Judge in holding that it cannot be questioned in a civil suit, but is conclusive as far as the result of the election is concerned. In other words, the candidate adversely affected cannot demand that a Civil Court should hold a fresh enquiry into the merits of the dispute, and, if it comes to a different decision on these, should treat the Collector's order as a nullity and give a declaration deciding the result and effect of the election In this case, no formal defect in procedure has been relied on. the only allegation in the plaint is that the Collector's order is unsupported by "legal evidence," a plea which has been sufficiently dealt with by the District Judge.

These conclusions, in our opinion, spring naturally from the fact that the status of a Municipal Councillor is the creation of section 10 of the Madras District Municipalities Act (Act IV of 1884), and that creation is subject *inter alia* to the conditions imposed by the Election Rules framed by the Governor in Council under section 250 of the same Act, and invested by clause (3) with the force of law. One of these rules is rule 36 which empowers the Collector under certain circumstances to declare an election invalid, and order another election to be held. The election, which, as the plaintiff contends, gives him a vested status is, in fact, only held conditionally on its being liable to be declared invalid: and an invalid election can confer no status whatever. The appellant's vakil lays stress on the words "appointed by election" in section 10 of the Act, as indicating that a candidate

acquires by election alone, apart from subsequent notification of appointment, a status, which he can bring a civil suit to establish. But the term "election" in these sections undoubtedly means a *valid* election, one which is not set aside under rule 36. It is only such a valid election as could confer any status: and it is not therefore necessary for us to go into the question of what is the legal position of a candidate who has been validly elected, but whose appointment has not been notified under section 21-A of the Act.

In support of our view that the validity of a Collector's order passed in substantial conformity with the requirements of the rules, cannot be questioned in a Civil Court, we may quote the remarks of JENKINS, C.J., in *Bhaishankar* v. *The Municipal Corporation of Bombay*(1): "Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things; a new order is brought into being." And again, "the jurisdiction of the Courts can be excluded, not only by express words, but also by implication, and there certainly is enough in section 33 of the Municipal Act for this purpose, for there is no right which the plaintiff can at this stage assert as the subject of this suit, which is not subject to the condition that its essential basis must depend on the decision of the tribunal created for that purpose." We consider that, as in section 33 of the Act then in contemplation, so in rule 36 in the present case, there is certainly enough to bar by implication the jurisdiction of the Civil Court.

We may also quote Maxwell on the "Interpretation of Statutes," 4th edition, page 197 (or 5th edition, page 215–6): "Where, indeed, a new duty or *cause of action* is created by statute, and a special jurisdiction out of the course of the common law is prescribed, there is no ouster of the jurisdiction of the ordinary Courts, *for they never had any*."

(1) (1907) I.L.R., 31 Bom., 604 at pp. 609 and 610.

ATLING AND SPENCER, JJ.

NATARAJA MUDALIAR v. MUNICIPAL COUNCIL OF MAYAVARAM.

The most pertinent of the cases relied on by the appellant are those reported in *Vijaya Rāgava* v. *Secretary of State for India*(1), *Sabhapat Singh* v. *Abdul Gaffur*(2) and *Lalbhai* v. *The Municipal Commissioner of Bombay*(3). We have carefully considered these rulings, but we do not find anything in them which should lead us to modify the views above indicated.

The first of these cases arose out of a suit brought by a Municipal Councillor for damages for wrongful removal from office under section 9 of Madras Act III of 1871. Apart from certain differences in the provisions of the Act, it can be distinguished from the present case on two broad grounds. In the first place, in that case, the Advocate-General on behalf of Government explicitly abandoned the plea that the plaintiff had been guilty of any misconduct or neglect of duty, the only grounds on which, under the section, Government were empowered to remove him. In its stead, he set up a purely discretionary power to remove which their Lordships held not to vest in Government. No such absolute discretionary power is in question here. Whether, if Government had stood by the position that the plaintiff had actually been guilty of misconduct or neglect, the Court would have deemed it proper to go into the truth of these allegations, it is difficult to say. The issues framed seem to raise no such question of fact. It is true that two of the learned Judges deal at considerable length with certain evidence bearing on plaintiff's conduct, but, as explained by HUTCHINS, J., this evidence was considered only as bearing on the question of damages. The second ground of distinction is that, as the suit was finally determined, it was one for damages only. The plaintiff had originally sued for two declarations: (1) that his removal was null and void, and (2) that he was entitled to hold office as Commissioner for the residue of his three years. The prayer for the second declaration was withdrawn and this is most important. Whether the prayer for the first declaration was also withdrawn is not certain (the statements in the judgments of HUTCHINS, J., and KERNAN, J., on this point being conflicting), but it is quite clear that it was not granted.

A suit for damages and a suit for the reliefs prayed for in the present suit stand on a very different footing. It is quite

(1) (1884) I.L.R., 7 Mad., 466. (2) (1897) I.L.R., 24 Calc., 107.
(3) (1909) I.L.R., 33 Bom., 334.

conceivable that a Court might grant damages claimed in consequence of an order, and yet decline to declare that the order was null and void. A comparison of the relief granted in the reported case, with the relief not granted (whether in consequence of a withdrawal or not) tends to suggest that such a distinction may have been actually drawn

The other cases are equally distinguishable. In *Sabhapat Singh* v. *Abdul Gaffur*(1) the Magistrate had set aside the election on the ground that the plaintiff, the candidate with most votes, was not qualified to stand. The suit was brought to declare that the plaintiff was a person qualified to vote and stand as a candidate (the qualifications were identical) and for a declaration that he was duly elected. We quite agree that the suit would lie as regards the first declaration, a matter which as the learned Judges point out affects the plaintiff's right to vote and stand at all future elections, and this is the chief point dealt with by them. The second declaration that he was duly elected was as a matter of fact refused. No doubt the learned Judges go into an objection to the election, which was not the basis of the Magistrate's order and say that they ought not to do anything to validate an election which was open to so grave an objection. This certainly suggests that they deemed the Civil Courts to have the power to override the Magistrate's order and adjudicate on the validity of an election. But inasmuch as they refused to exercise the power, the pronouncement, such as it is, is of the nature of an *obiter dictum* and the Court appears to have had in mind the special provisions of section 15 of the Act, then under consideration, which apparently reserves the jurisdiction of Civil Courts.

The case in *Lalbhai* v. *The Municipal Commissioner of Bombay*(2) is really beside the point. It is merely an authority for holding that even discretionary powers must be exercised in a reasonable manner, and not capriciously or arbitrarily.

The second appeal is dismissed with costs.

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(1) (1897) I.L.R., 24 Calc., 107. (2) (1909) I.L.R., 33 Bom., 334

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar.

1911. August 18.

B. PERRAJU GARU (PLAINTIFF), PETITIONER, IN ALL THE CIVIL REVISION PETITIONS,

v.

B. SUBBARAYUDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), *ss.* 3, 53, 189 *and sched. A, art* 8—*Suit for cist, local cess, village cess by an ijaradar—Maintainability only in Revenue Court—Exchange of patta and muchilika not necessary for recovery of rent by suit under Estates Land Act—'Ijaradar' and 'Rent,' definitions of—Art.* 13, *of sched. of Act IX of* 1887 (*Provincial Small Cause Courts Act*).

A suit by an ijaradar of a share of a village governed by the Estates Land Act (Madras Act I of 1908), for recovery of cist, local cess and village cess due by a ryot is cognizable by virtue of section 189 and Schedule A, article 8 of the Act only by a Revenue Court and not by a Small Cause Court, as all the above items sought to be recovered are by section 3 of the Act included in the term 'rent' and as an 'ijaradar' is according to section 3 (5) of the Act a 'landholder' being entitled to collect rent by virtue of a transfer from the owners.

No exchange of patta and muchilika is necessary under the Estates Land Act for recovery of rent by suit, the same being necessary according to section 53 only in cases where the landholder wishes to distrain or sell the ryot's movables or his holding.

It is wrong to hold that article 13 of the schedule to the Provincial Small Cause Courts Act (IX of 1887) applies to a suit for land cess or village cess under the above circumstances.

PETITIONS, under section 25 of Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of V. C. MASCARENHAS, the District Munsif of Cocanada, in Small Cause Suits Nos. 865 to 872 and 874 to 885 of 1909.

The facts of this case appear fully from the judgment.

T. Prakasam for the petitioner.

The respondents were not represented.

JUDGMENT.—This is a suit by the ijaradar of a share of the village of Karapa situated within the limits of the Pittapur estate for the recovery of cist, local cess and village cess due by the defendant who is one of the ryots cultivating land in the village. The suit was dismissed by the lower Court on the ground that

* Civil Revision Petitions Nos. 442 and 443 to 461 of 1910.

there was no agreement to dispense with pattas and muchilikas, it being admitted that there was no exchange of pattas and muchilikas so far as the cist was concerned. With respect to the cesses alleged to be due from the defendant the lower Court dismissed the suit on the ground that the suit was not cognizable by a Court of Small Causes, its jurisdiction being excluded by article 13 of the schedule to the Provincial Small Cause Courts Act. The finding against the agreement to dispense with pattas and muchilikas being one of fact, could not be, and has not been contested before me. But the District Munsif appears to be wrong in supposing that a suit in a Small Cause Court for rent would be unsustainable under the present law on the ground that there was no exchange of pattas and muchilikas. This was no doubt the rule under section 7 of Act VIII of 1865. But the Estates Land Act has altered the law on the subject. Section 53 of that Act lays down that "a landholder shall have no power to proceed against a ryot for the recovery of the rent by distraint and sale of his movable property or by sale of his holding . . . unless he shall have exchanged a patta and muchilika with such ryot," etc. But no such rule is enacted with respect to the recovery of the rent by a suit.

The District Munsif has overlooked another matter of importance in this case. The plaintiff as ijaradar comes within the definition of 'landholder' in section 3 (5) of the Estates Land Act, as the definition includes, "every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title," and the word 'rent' is defined so as to include "any local tax, cess, fee or sum payable by a ryot as such in addition to the rent due in respect of land according to law or usage having the force of law, and also money recoverable under any enactment for the time being in force as if it was rent." Section 189 of the Act read with schedule A, article 8, puts the plaintiff out of a Small Cause Court with respect to the whole of his claim which is composed partly of cist and partly of cesses—all of which are comprehended within the definition of rent.

The plaint must therefore be returned for presentation to the proper Court

I may observe that the District Munsif is also wrong in his view that article 13 of the schedule to the Provincial Small Cause

SUNDARA AYYAR, J.

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Courts Act applies to a suit for land cess or village cess. This question has been fully dealt with recently by a Bench of this Court of which I was a member. See Second Appeal No. 680 of 1910.

In the result I set aside the decision of the lower Court and direct that the plaint be returned for presentation to the proper Court.

In C.R.P. Nos. 443 *to* 461 *of* 1910.

JUDGMENT.—For the reasons given in Civil Revision Petition No. 442 of 1910, the District Munsif had no jurisdiction to try these suits. The judgments of the Munsif are reversed and the plaints returned for presentation to the proper Court.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. August 14.

SRI SRI SRI VIKRAMA DEO (MAHARAJAH OF JEYPORE), (PLAINTIFF), PETITIONER,

v.

RAGHUNATHA PATRO AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Ganjam and Vizagapatam Agency Rules—Agent's order under sec. XVIII—Maintainability of petition to High Court under Rule XX—Interference of High Court in proper cases—Section 244, bar by, who can set up.

A petition lies to the High Court under Rule XX of the Ganjam and Vizagapatam Agency Rules, even though the Agent acted under Rule XVIII in dismissing an appeal.

Jagannadha v *Gopanna*, [(1893) I.L.R., 16 Mad., 229], dissented from.

An order of the Agent summarily dismissing an appeal is a decree as it disposes of the rights of the parties, and under Rule XX the High Court may in a proper case (as here, where the Agent gives no reasons for dismissal) direct the Agent to review his judgment.

A person who was not a party to a previous suit cannot set up the effect of an order in execution in that suit as a bar to a suit against him.

Quære, whether, when section 244, Civil Procedure Code, does not apply to Agency Tracts, the principle of that section applies

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* Civil Miscellaneous Petition No. 2479 of 1909.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

SRI SRI SRI VIKRAMA DEO v. RAGHUNATHA PATRO.

APPLICATION under Rule XX of the Ganjam and Vizagapatam Agency Rules praying that, in the circumstances stated therein, the High Court will be pleased to direct F. C. PARSONS, the Agent to the Governor, Vizagapatam, to review his order, dated the 17th September 1909, in the appeal preferred to him against the following order in Original Suit No. 20 of 1908 on the file of H. H. F. M. TYLER, the Special Assistant Agent, Koraput Division :—

'This is a suit brought by the Maharajah of Jeypore against Bhagavan Sing Lal and two others, to obtain a declaration that a certain tope is in the possession of the defendants Nos. 1 and 2, and liable to attachment in execution of the decree of this Court in Original Suit No. 1 of 1900. The first issue framed was whether the plaintiff's suit is barred by the order of this Court in Execution Proceedings No 5 of 1906, dated 19th June 1907. As this issue was decided in favour of defendants, it is not necessary to refer to the remaining issues. In Execution Proceedings No. 5 of 1906, this Court held that the tope which forms the subject of the present suit, was not liable to attachment by the present plaintiff, on the ground that it was not in the possession of the judgment-debtors. This order has never been appealed against. The order was undoubtedly passed under section 244, Civil Procedure Code, though it is not so specifically stated. The vakil for the plaintiff urges that the order was passed under section 280, Civil Procedure Code, and that the present suit is brought under section 283, Civil Procedure Code. From the wording of the section 278, it is clear that section 280 cannot apply as the parties to the Execution Proceedings were the same as in the original suit, or their representatives in interest. Sections 278–283 only apply where a claim to attached property has been made by a person who was not a party to the original suit. On these grounds I hold that section 244, Civil Procedure Code, applies to the present suit, and that it is not therefore maintainable. I accordingly dismiss plaintiff's suit. The plaintiff will bear the costs of both parties.'

The Agent to the Governor, Vizagapatam, would not admit this appeal.

The plaintiff appealed to the High Court.

C. R. Thiruvenkatachariar and *T. Narasimha Chariar* for the petitioner.

B. Narasimha Row for the respondents

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

SRI SRI SRI VIKRAMA DEO v. RAGHUNATHA PATRO.

ORDER.—We do not think there is force in the preliminary objection that no petition lies to the High Court under Rule XX of the Ganjam and Vizagapatam Agency rules on the ground that the Agent has acted under Rule XVIII. In this contention the learned pleader for the respondent is no doubt supported by *Jagannatha* v. *Gopannā*(1) but with all respect to the learned Judges who decided that case we are unable to accept that decision as correct. They give no reasons. Rule XVIII only says that the Agent may summarily dismiss an appeal without issuing notice to the respondent. But such an order of dismissal as it disposes of the rights of the parties would be a decree and Rule XX says that the High Court in a proper case may direct the Agent to review his judgment. We hold that we have jurisdiction to entertain this petition.

The Agent does not give any reasons in support of the order of dismissal. But the Special Assistant Agent who originally heard the suit dismissed it on the ground that section 244 of the Civil Procedure Code of 1882 was a bar to the plaintiff's claim. The section itself is not in force in this agency. But supposing that the principle of that section could be applied which we do not decide, the third defendant whose claim was upheld in execution proceedings was not a party to the suit and therefore he could not invoke the principle of that section as a bar to the plaintiff's suit.

We set aside the order of the Agent and direct him to review his judgment in the light of the above observations.

Costs will abide the result.

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(1) (1893) I.L.R., 16 Mad., 229.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

MIRA MOHIDIN ROWTHER AND ANOTHER (PLAINTIFFS), APPELLANTS, 1911. August 16 and 22.

v.

NALLAPERUMAL PILLAI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), *secs.* 3, 4 *and* 14—*Filing suit in a wrong court on the day of its reopening after recess —Expiry of limitation during recess, effect of—Meaning of "prosecution" in sec* 14—"*Court*" *in sec.* 4, *meaning of.*

According to section 14 of the Limitation Act it is only the period during which a suit is actually prosecuted in a wrong court that can be excluded in favour of a plaintiff, but not the period before the filing of the suit, though the court was then closed for recess. So, if the period of limitation for the suit expired during the period of recess of the wrong court wherein the suit was filed on the day of its reopening, the suit must be held to be barred

It is only the period of closing of the proper court in which the suit must be instituted that can be taken account of under section 4.

Abhoya Churn Chukerbutty v. *Gour Mohun Dutt* (1875) 24 W.R., 26 followed.

Per Spencer, J.—Although the word "Court" in section 4 is not qualified by the adjective "proper" as it is in other parts of the Act, it would not be reasonable to take account of the closing and reopening of any other court in which the suit was rightly instituted.

Per Curiam.—According to section 3 the concessions awarded by the different sections of the Limitation Act are independent and cumulative

APPEAL under section 15 of the Letters Patent (24 and 25 Vict , Cap. 104) against the judgment and order of the Hon'ble Mr. Justice SANKARAN NAIR in Civil Revision Petition No. 154 of 1910 presented against the decree of K. SRINIVASA RAO, the Subordinate Judge of Tuticorin, in Small Cause Suit No 263 of 1909.

The facts are given sufficiently in Mr. Justice SPENCER's judgment.

N. Rajagopala Chariar for the appellants.

K. Srinivasa Aiyangar for the respondents.

AYLING, J.—In this case plaintiffs wish to exclude the period from the 14th June 1908 (expiry of 3 years from date of cause of

* Letters Patent Appeal No 4 of 1911.

AYLING AND SPENCER, JJ.
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MIRA MOHIDIN ROWTHER v. NALLAPPERUMAL PILLAI.

action) to the 6th July 1908 (date of filing the plaint in the Madura Sub-Court) as well as the period from the 6th July 1908 onwards and it is necessary for them to do so in order to save limitation. Admittedly section 14 of the Limitation Act cannot be extended to cover the period from the 14th June 1908 to the 6th July 1908. It is contended on behalf of plaintiffs that it is covered by section 4; and it is argued apparently with reason that the concessions awarded by the different sections of the Limitation Act are independent and cumulative. On the other hand, it is not denied that the proper Court in which the suit should have been filed reopened before the 6th July 1908 and respondents' vakil quotes the decision in *Abhoya Churn Chukerbutty v. Gour Mohun Dutt*(1) as authority for holding that in such circumstances section 4 cannot operate in plaintiff's favour. Appellant's vakil does not attempt to distinguish this case: but merely argues that the decision is wrong. I am not only prepared to follow the ruling in question, but entirely concur in it.

I consider that the only effect of section 4 is to extend the period of limitation from the 14th June 1908 to the date of re-opening of the proper Court. When that date expired and no plaint was presented the suit became effectively time-barred: and section 14 cannot assist plaintiffs, inasmuch as it could only take effect from the 6th July 1908.

I would dismiss the appeal with costs.

SPENCER, J.—The cause of action for this small cause suit arose on June 14, 1905 and June 14, 1908 was therefore the last day on which plaintiffs' suit could ordinarily be filed.

They actually filed their suit on July 6, 1908, in the Madura West Sub-Court, as on June 14 that Court was closed for the recess and July 6 was the reopening day. On an objection being taken by defendants to the jurisdiction of the Madura West Sub-Court the plaint was returned on February 17, 1909, for being presented to the Tuticorin Sub-Court and it was so presented on the next Court day, viz., February 19.

It has been found that the plaintiffs' action in going first to the Madura West Sub-Court was *bonâ fide* and not a mere device to save limitation. The learned judge who heard this revision petition held that plaintiffs were entitled under section 14 of the

(1) (1875) 24 W.R., 26.

Limitation Act to deduct the period from July 6 to February 17 during which they were prosecuting their suit with due deligence in the Madura Court, but not the period from June 15 to July 5 during which the Madura Court was closed. It is conceded that if this last mentioned period is deducted the suit will have been filed in time, but not otherwise. The appellants (plaintiffs) invoke the aid of section 4 of the Limitation Act of 1908 (section 5 of Act XV of 1877). Their pleader points out that the institution of every suit is by section 3 of the Act made subject to all the provisions contained in sections 4 to 25 and argues therefrom that the effect of the concessions in these sections may be cumulative He quotes the decisions in *Jawahir Lal* v. *Naram Das*(1), *Syadat-un-nissa* v. *Muhammad Mahmud*(2), *Tukaram (Gopal)* v. *Pandurang (Sadaram)*(3), *Saminatha Ayyar* v. *Venkatasubba Ayyar*(4), *Silamban Chetty* v. *Ramanadhan Chetty*(5), and *Banee Kant Ghose* v. *Haran Kishto Ghose*(6) to illustrate that all the provisions of the above sections that are appropriate to the suit concerned may be applied, that courts have been wont to put a fair and liberal construction on the law of limitation and in many cases have allowed the provisions of more than one section to operate in the calculation of time in a particular suit, *e.g.*, if the time for presenting an appeal expires on a day when the court is closed an appellant who has not obtained copies of the decree and judgment appealed against may by applying for copies on the date when the court reopens obtain an extension of time for filing his appeal by the period requisite for obtaining copies, and thus reap the benefit both of section 4 and section 12.

I am not at variance with the principles enunciated in these decisions, but I observe that none of them deal with the case of proceedings instituted in the wrong court, except the last on the list which related to an execution application made in a court not competent to execute the decree, that in this case the section upon a reading of which the decision turned, was section 15 of Act IX of 1871 and that the law has since been altered so as to include applications as well as suits.

The only decision to which our attention has been directed in which the facts were similar to the present is that of *Abhoya*

(1) (1878) I.L.R., 1 All., 644. (2) (1897) I.L.R., 19 All., 342.
(3) (1901) I.L.R., 25 Bom., 584. (4) (1904) I.L.R., 27 Mad., 21.
(5) (1910) I.L.R., 33 Mad., 256. (6) (1875) 24 W.R., 405.

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Churn Chuckerbutty v. *Gour Mohun Dutt*(1). In that case a suit was filed in a District Munsif's Court and was finally decreed, but in appeal it was discovered that the District Munsif had no jurisdiction and the suit was ultimately returned for being filed in a Small Cause Court. The plaintiff sought to exclude not only the time occupied by the prosecution of his suit in the two courts of original and appellate jurisdiction but also the period during which the District Munsif's court was closed for vacation before his suit was first instituted and the period between the Appellate Court's decision and the return of his plaint by the lower court. The circumstances of that case differed from those of the case which we are considering in that an appeal intervened between the proceedings in the court in which the suit was wrongly instituted and the proceedings in the proper Court and also because there was in that case a second ground for declaring the suit to be time-barred owing to the plaintiff's negligence in not applying for the return of his plaint as soon as the appeal was decided. The intervention of an appeal will, however, make no difference under Explanation II to section 14. The Calcutta High Court decided both points against the plaintiff and I am not prepared to hold that the view taken by them was unsound. I agree with the learned judge who decided the revision petition that the prosecution of the suit in the Madura Sub-Court can only be deemed to have commenced on July 6 when the plaint was presented. Although the word "Court" in section 4 is not qualified by the adjective "proper" as it is in other parts of the Act, it would not be reasonable to take account of the closing and reopening of any other court than that in which the suit was rightly instituted. It seems to me that after June 14 the plaintiffs' claim to recover money from defendants was no longer alive, as a plaint presented in the Court having jurisdiction to entertain it, would have been rightly rejected as time-barred, and that nothing that plaintiffs could do after that date would have the effect of reviving a time-expired claim.

The appeal is dismissed with costs.

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(1) (1875) 24 W.R., 26

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

1911. August 18, 22.

SUBRAMANIA PILLAI (PETITIONER, PLAINTIFF), APPELLANT,

v.

SEETHAI AMMAL AND ANOTHER (RESPONDENTS NOS. 2 and 3, DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), article 182—Revision to the High Court—Order in, not giving any fresh starting point for execution of original decree—Effect of reversal or modification in revision—'Appeal' meaning of, in Limitation Act—Letters Patent Appeal from revision, no 'appeal.'

An order of the High Court passed in the exercise of its revisional powers is not an order on an 'appeal' within the meaning of article 182, sub-clause (2), so as to create a fresh starting point for the calculation of limitation

Per curiam —Unlike the word 'appeal' in sections 15 and 39 of the Letters Patent, the word 'appeal' in the Limitation Act is used in the narrower sense so as to exclude a revision, this is clear from the three classifications in the Limitation Act, *viz.*, 'suits, appeals and applications,' which last include applications for revision

If the High Court interferes on revision, either there is a decree passed by the High Court which may be executed under the first clause of article 182 or the case is sent down with a direction to the Lower Court to amend its decree. The latter appears to be the regular course and in such event there is no room to employ any sub-clause other than sub-clause (1) or the new sub-clause (4). Where a revision petition is simply dismissed, no fresh starting point of limitation arises. When the order appealed against cannot give any fresh starting point (viz., the order in the revision petition) an order in a Letters Patent Appeal therefrom, cannot give one, as if it were an appeal within the meaning of article 182

Chappan v. Moidin Kutti (1899) I L.R., 22 Mad, 68, *Secretary of State for India in Council v British India Steam Navigation Company*, [(1911) 15 C.W N, 849] *and Harish Chundra Acharja v Nawab Bahadur of Murshidabad*, [(1911) 15 C.W.N, 879], distinguished.

Judgment of WALLIS, J., confirmed

APPEAL under section 15 of the Letters Patent (24 and 25 Vict, Cap 104) against the judgment and order of the Hon'ble Mr. Justice WALLIS, in Civil Revision Petition No. 230 of 1910 presented against the order of V DANDAPANI PILLAI, the District Munsif of Kumbakōnam, in Execution Petition No. 655 of 1909.

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* Letters Patent Appeal No 9 of 1911.

ATLING AND SPENCER, JJ.

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The facts of this case are stated in the judgment of WALLIS, J., as follows:—

"Under article 182 of the Indian Limitation Act, sub-clause (2), there is a fresh starting point for execution 'where there has been an appeal', sub-clause (3), applies where there has been a review, sub-clause (4), where there has been an application for execution or to take a step in aid of execution and so on. It is now argued before me that the filing of a petition under section 25 of the Small Cause Courts Act is an appeal for the purposes of sub-clause 2 and gives rise to a fresh starting point. No authority has been cited for this proposition and I am unable to accept it. The Limitation Act must, I think, be read with the Civil Procedure Code to which it constantly refers, and so reading it I do not think the word 'appeal' in sub-clause (4) can be read as including a 'revision petition' either under section 25, Small Cause Courts Act or under section 115 of the present Civil Procedure Code. If the legislature had intended that the filing of a revision petition should give rise to a fresh starting point, no doubt they would have said so in express terms. Where a revision petition has been filed and dismissed I think that time runs from the date of the original decree under sub-clause (1). Where the decree is modified in revision, than the decree as modified by the order is to be executed and time runs under sub-clause (1) from the date of the order and where the revision petition is dismissed with costs as here, I think that for the execution of the original decree time runs from the date of the decree, and for the execution of the appellate order for costs time runs from the date of the High Court's order.

The petition is dismissed with costs."

K. Bhashyam Aiyangar for appellants.

The Hon. Mr. *T. V. Seshagiri Ayyar* for respondents.

JUDGMENT.—The question for decision is whether an order of the High Court passed in the exercise of its revisional powers under section 115 of the Code of Civil Procedure is an order on an appeal within the meaning of article 182, sub clause (2) of the Limitation Act so as to create a fresh starting point for the calculation of limitation. WALLIS, J., has held that it is not, and we are inclined to agree with him. The decisions in *Chappan v. Moidin Kutti*(1) in *Secretary of State for India in Council v*

(1) (1899) I.L.R., 22 Mad., 68

British India Steam Navigation Co.(1) and in *Harish Chandra Acharja* v. *Nawab Bahadur of Murshidabad*(2) do not really touch the question. They only consider the effect of orders passed by the High Court in the exercise of its revisional jurisdiction as they stand in relation to the power of appeal conferred by sections 15 and 39 of the Letters Patent.

When a question was raised whether an order passed under section 622, corresponding to section 115 of the present Code of Civil Procedure was passed in the exercise of the High Court's original or appellate jurisdiction it involved no straining of language to decide that the word appeal used in sections 15 and 39 was used in a comprehensive sense so as to include both what is described technically as an appeal as also the Common Law writ of error. But the word appeal seems to be used in its narrower sense in the Limitation Act, for in the first schedule of the Act a division is made between suits, appeals and applications and it could never be contended that the second division includes revision petitions among appeals for which ninety days limitation is prescribed. There is no reason to suppose that the word is used in a narrower sense in articles 150 to 157 and in a more extended sense in article 182 of the same schedule. If a High Court interferes on revision either there is a decree passed by the High Court which may be executed under the first sub-clause of article 182 or the case is sent down with a direction to the Lower Court to amend its decree. The latter appears to be the regular course and in such event there is no room to employ any sub-clause other than sub-clause (1) or the new sub-clause (4). Where a revision petition is simply dismissed, as was the case here with the revision petition presented under section 25 of the Provincial Small Cause Courts Act, no fresh starting point of limitation arises.

At first sight it may seem somewhat anomalous, to take a concrete instance, that if a Small Cause Court passes a decree for Rs 100, and the sum is reduced on revision to Rs. 50, the decree holder should while getting less money be allowed more time to recover it than he would have if the revision petition were simply dismissed. But even greater anamolies would arise were we to accept the position which the appellant wishes us to take. We

(1) (1911) 15 C.W.N., 848. (2) (1911) 15 C.W.N., 879.

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should, for instance, be driven to the conclusion that the word appeal was used in two different senses in the same Act. We are also conscious of the fact that in the present instance it may be said that there has been an appeal under the Letters Patent but it is evident that the decision of this Court cannot provide a new starting point in a case where the order appealed against did not give any.

This appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. Sept. 6.

JAMNA DOSS (RESPONDENT, AGENT AND WITNESS FOR THE PLAINTIFF), APPELLANT,

v.

A. M. SABAPATHY CHETTY (PETITIONER, SECOND DEFENDANT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 195, cl. 7 (c).—Order granting sanction by Presidency Small Cause Court—Appeal to High Court—Jurisdiction to Appellate and not Original Side—'Principal Court of Original Jurisdiction', meaning of.

From an order of the Presidency Small Cause Court giving or refusing sanction, an appeal lies to the High Court generally and not to any particular branch of it. But the jurisdiction it exercises being Appellate and not Original, it is the Appellate side alone that can dispose of such matters. The effect of clause 7 (c) of section 195, Criminal Procedure Code, is merely to designate the Court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises in dealing with orders of the Small Cause Court. Its effect is only to make the High Court the appellate tribunal.

Sew Bollock Singh v. Ramdhan Bania, [(1910) 14 C.W.N., 806], followed.

Per curiam.—When one Court deals with a judgment of another Court having power to confirm or to set it aside, the jurisdiction it exercises is appellate jurisdiction. Original jurisdiction is the jurisdiction in original proceedings instituted in the Court, whether suits, petitions or other proceedings. The Original Side of the High Court is not a different *Court* from the Appellate Side: the Court is one; but it exercises both original and appellate jurisdiction.

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* Appeal Against Order No. 184 of 1910.

APPEAL against the order of J. H. BAKEWELL, the Chief Judge of the Court of Small Causes, Madras, dated the 26th October 1910, according sanction for the prosecution of the appellant Jamna Doss, the agent and witness for the plaintiff in Suit No. 10215 of 1910, on the file of the Court of Small Causes, Madras, for offences under sections 193 and 194 of the Indian Penal Code.

The facts of the case are sufficiently stated in the judgment.

The Hon. Mr. *T. Richmond* and the Hon. Mr. *L. A. Govindaraghava Ayyar* for the appellant.

S. Subbiah Chetty for the respondent.

JUDGMENT.—[After finding on the facts that the sanction granted must be quashed, the judgment continued.]

A preliminary objection was raised by Mr. K. Ramanath Shenai that this Bench sitting on the appellate side of the Court has no power to hear this appeal. The appeal is preferred under section 195 of the Criminal Procedure Code. Clause 7 (*c*) of that section provides "where no appeal lies, such Court (*i.e.*, the Court granting the sanction) shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate." According to this clause, an appeal against an order of the Small Cause Court granting sanction would lie to the High Court because the High Court is the principal Civil Court of original jurisdiction within whose jurisdiction the Presidency Court of Small Causes is situate. Mr. K. Ramanath Shenai contends that the Court to which the appeal lies is the Original Side of the High Court. This argument is based on the assumption that the Original Side of the High Court is a different Court from the Appellate Side. This, in our opinion, is quite fallacious The Court is one but it exercises both original and appellate jurisdiction In interpreting section 591 of the repealed Code of Civil Procedure (Act XIV of 1882) which lays down that no appeals shall lie from appellate orders passed under section 588, it has been pointed out by this Court that the section would not apply to orders passed under section 588 by a Judge of this Court, because section 591 deals with appeals from one Court to another while the High Court is one Court by whomsoever the jurisdiction of the Court may be exercised whether by a single Judge or by a bench of more than one Judge. We therefore are of

SUNDARA AYYAR, AND AYLING, JJ.

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opinion that there is no foundation for the argument that the appeal lay to one particular branch of this Court.

It is next contended that as the appeal lies to the High Court as the principal Civil Court of Original Jurisdiction we as a Bench constituted to exercise appellate jurisdiction have no power to hear the case. In our opinion the effect of clause 7 (*c*), section 195, Criminal Procedure Code, is merely to designate the Court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises in dealing with the orders of the Small Cause Court. Its effect is only to make the High Court the appellate tribunal. When the High Court deals with a sanction granted by the Small Cause Court, does it exercise original or appellate jurisdiction? As we understand the matter when one Court deals with a judgment of another Court, having power to confirm or to set it aside, the jurisdiction it exercises is appellate jurisdiction. Original jurisdiction is the jurisdiction in original proceedings, *i.e.*, proceedings instituted in the Court whether suits, petitions, or any other proceedings. We cannot agree that in deciding whether we should revoke the order of the Presidency Small Cause Court granting sanction against the appellant or refuse to do so we are exercising any original jurisdiction, though we are acting as the High Court which under clause 7 (*c*) of the section is invested with the power of dealing with cases of sanction granted or refused by the Presidency Small Cause Court. Being of opinion that power of this Court to deal with a sanction granted by another Court comes within the purview of its appellate and not original jurisdiction, we hold that we have the power to hear and dispose of the appeal and disallow the preliminary objection. The view we have taken is in accordance with the judgment of PUGH, J., of the Calcutta High Court reported in *Sew Bollock Singh* v. *Ramdhan Bania*(1) where the learned Judges point out that the High Court acts in the exercise of revisional jurisdiction in dealing with cases under section 195, Criminal Procedure Code.

(1) (1910) I.L.R., 37 Calc., 714.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

S. RAMAMURTI DHORA AND THREE OTHERS (PLAINTIFFS (Nos. 1, 2, 4 AND 5), APPELLANTS,

1911. October 11 and 13.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM) (DEFENDANT), RESPONDENT *

Right of Suit—Suit for exemption from land revenue, owner alone can bring suit for land, by A against B, ending in favour of A—Third parties cannot question— Res judicata, *Civil Procedure Code (Act V of 1908), sec 13, not exhaustive.*

A suit for a declaration that the land is not liable to assessment can be instituted only by the person entitled to it as owner.

If a suit relating to ownership of the land, between two persons, has ended in favour of one of them, third parties having no interest in the land at the time of the litigation cannot, in the absence of any collusion or fraud on them, dispute the settlement of the dispute between them as to title, even for supposed want of jurisdiction, and it is equally true that neither of the parties to the litigation can be permitted to aver as against third persons in the like position that the land belongs to himself and not to his opponent in the litigation.

Second Appeal No. 674 of 1909, followed

"Bigelow on Estoppel", 5th edition, 44, referred to.

Per Curiam.—The question does not depend upon the application of the doctrine of *res judicata.* Section 13, Civil Procedure Code, does not cover all cases of estoppel by judgment

The suit was for a declaration that the defendant the Secretary of State for India, was not entitled to levy any assessment on certain lands which the plaintiffs claimed as part of their Agraharam In previous suits by *B* against plaintiffs once for a declaration of title and afterwards for possession of the lands the judgments were in favour of *B*

Held, that the plaintiffs in the present suit cannot be permitted to prove as against the present defendant that they were the owners and (2) that the suit was not maintainable.

Semble: Even if the previous litigation had ended in favour of the present plaintiffs, the Government, though it would not be entitled to question the plaintiff's title, would not be bound to regard the land as exempt from revenue

SECOND APPEAL against the decree of D RAGHAVENDRA Rao, the Temporary Subordinate Judge of Vizagapatam, in Appeal No. 362 of 1907, presented against the decree of S. VENKATASUBBA

* Second Appeal No 248 of 1910

SUNDARA AYYAR AND PHILLIPS, JJ.

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RAO, the District Munsif at Chodavaram, in Original Suit No. 306 of 1906.

The facts of this case are sufficiently set out in the judgment.

P. Narayanamurti for the appellants.

The Government Pleader for the respondent.

JUDGMENT.—In the suit out of which this Second Appeal arises the plaintiffs prayed for a declaration that the defendant, the Secretary of State for India in Council, was not entitled to levy any assessment on certain lands which they claimed, as part of their Lingabhupalapuram Agraharam. The defendant contended that the lands in question did not belong to the plaintiffs, that, in Original Suit No. 588 of 1891 in the Chodavaram District Munsif's Court, one Kannigadu and Sonigadu sued the present plaintiffs for a declaration that the lands belonged to them as Barikis (*i.e.*, village watchmen) and obtained a decree which was confirmed on appeal and second appeal, that subsequently they instituted another suit under the Madras Regulation VI of 1831 in the Revenue Court for the recovery of the lands and it was decided that they were entitled to the assessment of the lands from the present plaintiffs, that the plaintiffs could not therefore now be permitted to claim the lands as their own and that there is no cause of action for the suit. Both the lower Courts dismissed the plaintiffs' suit holding that the question of the plaintiffs' title to the land comprised in Original Suit No. 588 of 1891 is *res judicata* The plaintiffs alleged that that suit did not comprise the whole of the lands included in the present suit. But we must accept the finding of the lower Courts that the lands in both the suits are the same.

We are of opinion that the plaintiffs have no cause of action which would entitle them to maintain the suit. The land admittedly belongs either to them or to the Barikis. The dispute between them was settled in Original Suit No. 588 of 1891 and the Barikis subsequently obtained in the Revenue Court a decree for such possession of the land as they were entitled to. The suit for declaration that the land is not liable to assessment can be instituted only by the person entitled to it as owner. It is contended that the plaintiffs are entitled to prove in this suit that the land belongs to them and not to the Barikis, and that the decision in Original Suit No. 588 of 1891 cannot be relied on by the defendant as he was not a party to that suit. This, in our opinion, is an entirely untenable proposition. It is not

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contended that the plaintiffs would have any cause of action unless the land belonged to them as part of their Agraharam. The question relating to the ownership of the land was one entirely between the plaintiffs and the Barikis; and the Barikis having obtained judgment against the plaintiffs, third parties having no interest in the land at the time of the litigation cannot dispute the settlement of the dispute between them as to title, and it appears to us to be equally true that neither of the parties to the litigation can be permitted to aver as against third persons in the like position that the land belongs to himself and not to his opponent in the litigation Suppose there is a dispute between *A* and *B* as to which of them is the owner of a zamindari, and it is decided in favour of *A*. Can *B* be permitted to sue each of the ryots of the zamindari for rent on the ground that the zamindari belongs to himself and not to *A*? It seems to us that undoubtedly he cannot. See our judgment in Second Appeal No. 574 of 1909. Again could *B* be permitted to institute a suit against Government for a declaration that it is not entitled to levy water-cess under Act VII of 1865 on certain lands in the zamindari, and claim to prove therein that the zamindari belongs to himself and not to *A*? The answer must be in the negative. In "Bigelow on Estoppel," 5th edition, page 44, the learned author observes as follow:—

"Littleton says: 'Where a man is outlawed upon an action of debt or trespass, or upon any other action or indictment, the tenant or the defendant may show the whole matter of record and the outlawry, and demand judgment if he (the demandant or plaintiff) shall be answered' Lastly, Lord Coke says: 'Where the record of the estoppel doth run to the disability or legitimation of the person, there *all strangers* shall take benefit of that record; as outlay, excommenqement, profession, attainder of præmunire of felony, etc, bastardy, mulierty, and shall conclude the party though they be strangers to the record. But of a record concerning the name of the person, quality, or addition no stranger shall take advantage, because he shall not be bound by it.' This principle is not confined to actions *in rem* as stated by the learned author already referred to. "If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all, as much as would a conveyance of a joint estate by all the parties

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interested. Judgment in an action strictly *in personam*, indeed, binds third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion. Judgment that *A* is debtor of *B* is an example. . . . Indeed, the difference between judgments *in rem* and judgments *in personam* in our law, as regards their effect, appears at bottom to be only a difference of degree" (see p. 18). Again he observes "Third persons cannot object when those who have the exclusive right to settle a question have done so without fraud upon them; in the absence of fraud upon them, those (not being privies) who are not, or from want of interest might not be, parties, have no concern with the judgment, and cannot attack it even for supposed want of jurisdiction, or for fraud upon others" (see p. 151).

The question does not depend on the application of the doctrine of *res judicata* between the parties as expounded in section 13 of the Civil Procedure Code. That section does not cover all cases of estoppel by judgment. We must hold that the plaintiffs *cannot be permitted to prove that they are the owners of the land* in question. They have therefore no cause of action.

Mr. Narayanamurti who appears for the plaintiffs asks whether, if the decision in Original Suit No 588 of 1891 had been in favour of the plaintiffs, the Government would be bound to regard the land as exempt from revenue. The answer is that Government would not be entitled to question the plaintiff's title to the lands as against the Barikis but would be entitled to say that the land is not exempt from the payment of assessment. That is a question which could not be finally decided between the plaintiffs and the Barikis.

In the result we dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

MAMI *alias* NAGAPPAN (MINOR) BY NEXT FRIEND PALAYAM SUBBARAYAR (FIRST DEFENDANT), APPELLANT.

1911. October 18 and 19.

v.

SUBBARAYAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption by mother with the assent of a deceased son—Objection by existing sapinda—Invalidity of adoption.

A consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved of or objected to by the persons who are the nearest sapindas at the time the adoption is actually made.

Strange's Hindu Law, [Vol. I p 80], and Sircar on Adoption, [p 255] not followed.

Per curiam There is a distinction between the case of an adoption in an undivided family and that in a divided family as regards the persons whose assent is sufficient.

The Collector of Madura v. *Moottoo Ramalinga Sathupathy* [(1868) 12 M.I.A., 396 at p. 442], *Vellanki Venkata Krishna Rao* v *Venkata Rama Lakshmi* [(1876) I.L.R., 1 Mad., 174], and *Subrahmanyam* v. *Venkamma*, [(1903) I.L.R., 26 Mad 627 at p 635], referred to

SECOND APPEAL against the decree of R. D. BROADFOOT, the District Judge of Coimbatore, in Appeal No. 149 of 1909, presented against the decree of M. RAVI VARMA RAJA, the District Munsif of Kollegal in Original Suit No 113 of 1908.

In this case A, an adopted son, left a will by which he authorized his widowed adoptive mother to adopt his natural younger brother. On the death of her adopted son, the widow adopted the boy which was not expressly consented to by any of the dayadis. Plaintiff, a near dayadi, filed this suit for a declaration of the invalidity of the adoption Both the lower courts declared that the adoption was invalid and set it aside for want of assent of the nearest sapinda to the adoption.

The Hon. the Advocate-General and *T M. Krishnaswami Ayyar* for the appellant

* Second Appeal No. 468 of 1910.

BENSON AND ABDUR RAHIM, JJ.

MANI v. SUBBAYYA.

T. R. Ramachandra Iyer and *K. B. Ranganada Iyer* for the respondent.

JUDGMENT.—The question in this case relates to the Hindu Law of Adoption and is not covered by any reported decision or the authority of any text. It is this: whether an adoption which is made by a Hindu widow with the authority of her son granted under a will is valid. The learned Advocate-General who supports the adoption contends that the son, while he was living, was the nearest sapinda of his father, and he having assented to the adoption being made it should be held to be valid, although after the son's death the nearest sapinda at the time objected to the adoption. The only thing in the nature of authority which the Advocate-General is able to cite in favour of his proposition is the opinion of a Pandit of Vizagapatam reported in Sir Thomas Strange's Hindu Law (Vol. I, page 80 and Vol. II, page 95). It does not appear that this opinion formed the basis of decision in any case, and all that Sir Thomas Strange says in connection with it is that it has been thought that adoption under such authority or sanction would be valid according to the principle of the Benares school. The Advocate-General has also drawn our attention to Sircar's Tagore Lectures on the Law of Adoption, page 255, but the learned writer does not carry the matter any further than as resting upon the opinion of the Pundit in question.

On the other hand, all the decided cases brought to our notice, in which an adoption made with the assent of sapindas has been upheld, were cases in which the sapindas, who were competent to express any opinion on the matter and authorized or assented to the adoption were living at the time of the adoption. No case has been brought to our notice in which the authority given by a deceased sapinda who while living was the one most competent to decide upon the propriety or otherwise of the adoption being made was held to be sufficient to authorise an adoption made after his death in disregard of the opinion of the nearest sapindas who were living at the date of adoption and had not joined the deceased sapinda in giving the authority. The question is, should we be justified in extending the rule regarding adoptions with the assent of sapindas to a case like this. It is not quite easy to ascertain the exact principle on which the necessity or sufficiency of the assent of sapindas is based. The leading authority on

the subject is *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(1). In that case their Lordships seem to draw a distinction between the case of an adoption in an undivided family and that in a divided family. In a case of the former class, the judicial committee seem to be of opinion that the undivided male members ought to be consulted both because they are the natural protectors and guardians of the widow, and because their interest in the family property would be affected by the adoption, while in the latter case they seem inclined to lay more emphasis on the presumed incapacity of a widow in the eye of Hindu Law to judge for herself rather than on the fact that the presumptive or reversionary rights of the sapindas would be defeated by the adoption. They have made it clear in that case, as explained in the later case in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(2) that the assent to be given must be in the nature of a decision of a family council on the propriety or expediency of the adoption. Having regard to the difficulty that would arise in the working of the law, if the assent of all the kinsmen, however remote, were deemed to be necessary, it has been held [see *Subrahmanyam* v. *Venkamma*(3)] that the principle of the decisions of the Privy Council would be satisfied if the consent of the nearest sapindas, even if there is only one such, be obtained. But it cannot be said to have been in the contemplation of the learned judges who held so, that the consent of the nearest sapinda would be sufficient, even if at the time of adoption that sapinda is no longer living, and the person who is the nearest sapinda at the time does not consent to the adoption. It must, we think, be conceded that, if a sapinda who has even given his consent withdraws it, afterwards the widow would not be entitled to act upon such consent and it seems to us to be unreasonable to hold that a consent once given should become irrevocable by the death of the sapinda giving the consent, so as to override the opinion of the sapindas who subsequently became entitled to be heard. But it is contended that, if the authority is acted upon within a reasonable time, that ought to be sufficient to obviate the necessity of obtaining the consent of the sapindas living at the date of adoption. No doubt it may not be necessary that the

(1) (1868) 12 M.I.A., 398 at p. 442. (2) (1876) I.L.R., 1 Mad., p. 174.
(3) (1903) I.L.R., 26 Mad., 627 at p. 635.

BENSON AND ABDUR RAHIM, JJ. — MAMI v. SUBBARAYAR.

consent should be given actually at the time the adoption is made, but it seems to us that at any rate a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made.

We think the decree of the lower courts is correct and dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. November 2 and 7.

SENGODA GOUNDAN (PLAINTIFF), APPELLANT,

v.

VARADAPPAN *alias* RASA GOUNDAN AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Tree Patta—Effect of cancellation of, on land-pattadar—No resumption or grant to the latter—Right of tree-pattadar for the trees even after cancellation as against land-pattadar—Possessory right, protection of, as against trespassers.

A person who was in possession until dispossessed by defendants who having no title as owners were mere trespassers is entitled to rely on his possession and succeed in a suit to eject them.

Narayana Rao v. *Dharmachar* (1903) I.L.R., 26 Mad., 514 and *Subbaroya Chetty* v. *Aiyasami Aiyar* (1903) I.L.R., 32 Mad., 93, followed.

In the absence of proof to the contrary, a cancellation of a patta issued by the Government in favour of the plaintiff in respect of trees standing on certain lands for which lands the patta was being issued in favour of defendants does not amount to a resumption of possession of the trees by the Government or to a grant of them by the Government to the defendants. The only effect of cancellation of the patta for the trees was that the Government no longer made any demand on the tree pattadars for revenue in respect of the trees.

The facts that when both pattas were in existence the land-pattadar was credited with whatever revenue was collected from the tree pattadar, and that on cancellation of the tree patta the whole revenue was payable by the land-pattadar cannot amount to a grant of the trees to the land pattadar. On the rights of tree-pattadar and land-pattadar. Reference under Section 39 of Madras Forest Act, [(1889) I.L.R., 12 Mad., 203] and *Thirumalai Pandithan* v. *Secretary of State for India* [(1898) I.L.R., 21 Mad., 433], referred to.

SECOND APPEAL against the decree of W. B. AYLING, the District Judge of Salem, in Appeal No. 188 of 1909, presented against

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* Second Appeal No. 726 of 1910

the decree of T. S. THIAGARAJA AIYAR, the District Munsif of Namakkal, in Original Suit No. 1192 of 1908.

BENSON AND SUNDARA AYYAR, JJ.

SENGODA GOUNDAN v. VARADAPPAN

The facts of this case are set out in the judgment.

T. R. Venkatarama Sastriar for the appellant.

V. Viswanada Sastry for first respondent

JUDGMENT.—In this case, the plaintiff (appellant) held a patta for certain trees on land in certain survey fields, and the defendants (respondents) held the patta for the land. The plaintiff had possession of the trees for more than twenty years prior to 1906. In that year, the Revenue authorities cancelled the patta which they had given to the plaintiff The defendants then interfered with the plaintiff's enjoyment of the trees and deprived him of their possession. The plaintiff therefore brought this suit to recover possession of the trees and for mesne profits.

The District Munsif gave him a decree, but the District Judge reversed it on appeal and dismissed the suit. We think the decree of the District Munsif is right.

The successive standing orders of the Board of Revenue, Madras, in regard to tree-pattas are to be found at pages 5, 6 and 7 of Maclean's edition of 1878, and at pages 36 and 40 of the Government Editions of 1900 and 1907, respectively.

The respective rights of parties in the position of the plaintiff and defendants, who for the sake of brevity are called tree-pattadar and land-pattadars, respectively, are discussed in the cases reported in *Reference under section 39 of Madras Forest Act*,(1) and *Theivu Pandithan* v. *Secretary of State for India*(2) It was there held that the tree-pattadar "has an interest, during the continuance of his patta, in the tree itself, and in all that is necessary for the growth of the tree, including the soil in which it grows."

The District Judge held that the plaintiff's interest in the trees ceased to exist as soon as the patta was cancelled and that he could not rely on his possession, because it was not really adverse to the defendants but was rather that of a licensee, and when the tree-patta was cancelled the effect was to "complete the land-pattadar's natural and usual proprietary right in his land by cancelling the limitation which the existence of the tree-patta imposed on him."

(1) (1889) I.L.R., 12 Mad., 203. (2) (1898) I.L.R., 21 Mad., 433.

BENSON AND ABDUR RAHIM, JJ.

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APPELLATE CIVIL.

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1911. November 2 and 7.

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A person who was in possession until dispossessed by defendants who having no title as owners were mere trespassers is entitled to rely on his possession and succeed in a suit to eject them.

Narayana Rao v. *Dharmachar* (1903) I.L.R., 26 Mad., 514 and *Subbaroya Chetty* v. *Aiyasami Aiyar* (1909) I.L.R., 32 Mad., 86, followed.

In the absence of proof to the contrary, a cancellation of a patta issued by the Government in favour of the plaintiff in respect of trees standing on certain lands for which lands the patta was being issued in favour of defendants does not amount to a resumption of possession of the trees by the Government or to a grant of them by the Government to the defendants. The only effect of cancellation of the patta for the trees was that the Government no longer made any demand on the tree pattadars for revenue in respect of the trees.

The facts that when both pattas were in existence the land-pattadar was credited with whatever revenue was collected from the tree-pattadar, and that on cancellation of the tree patta the whole revenue was payable by the land-pattadar cannot amount to a grant of the trees to the land pattadar. On the rights of tree-pattadar and land-pattadar. Reference under Section 39 of Madras Forest Act, [(1889) I.L.R., 12 Mad., 203] and *Thiru Pandithan* v. *Secretary of State for India* [(1898) I.L.R., 21 Mad., 433], referred to.

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T. R. Venkatarama Sastriar for the appellant.

V. Viswanada Sastry for first respondent

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The District Munsif gave him a decree, but the District Judge reversed it on appeal and dismissed the suit. We think the decree of the District Munsif is right.

The successive standing orders of the Board of Revenue, Madras, in regard to tree-pattas are to be found at pages 5, 6 and 7 of Maclean's edition of 1878, and at pages 36 and 40 of the Government Editions of 1900 and 1907, respectively.

The respective rights of parties in the position of the plaintiff and defendants, who for the sake of brevity are called tree-pattadar and land-pattadars, respectively, are discussed in the cases reported in *Reference under section 39 of Madras Forest Act*,(1) and *Theivu Pandithan* v. *Secretary of State for India*(2). It was there held that the tree-pattadar " has an interest, during the continuance of his patta, in the tree itself, and in all that is necessary for the growth of the tree, including the soil in which it grows."

The District Judge held that the plaintiff's interest in the trees ceased to exist as soon as the patta was cancelled and that he could not rely on his possession, because it was not really adverse to the defendants but was rather that of a licensee, and when the tree-patta was cancelled the effect was to "complete the land-pattadar's natural and usual proprietary right in his land by cancelling the limitation which the existence of the tree-patta imposed on him."

(1) (1889) I.L.R., 12 Mad., 203. (2) (1898) I.L.R., 21 Mad., 433.

BENSON AND SUNDARA AYYAR, JJ.

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We do not think that this view is correct. So far as appears in this case, the only effect of the cancellation of the tree-patta was that Government no longer made any demand on the tree-pattadars for revenue in respect of the tree.

It is not shown, or even contended, that Government resumed possession of the trees, or made any grant of them to the defendants. The District Judge no doubt states that when both pattas were in existence the land-pattadar was credited with whatever revenue was collected from the tree-pattadar and that on the cancellation of the tree-patta, the whole revenue was payable by the land-pattadar.

But this cannot be taken to evidence a grant of the trees to the land-pattadar and the District Munsif points out that no revised patta was issued to the latter enhancing the revenue payable by him. The Government is no party to the suit and it is unnecessary to consider how far, if at all, the position of the tree-pattadar *quoad* the Government is affected by the cancellation of the tree-patta. For all that appears, the rights of the tree-pattadar may have been, and probably were, in existence before the land patta was granted. Even if it is assumed that Government by cancelling the tree-patta could and did reserve complete ownership of the trees, there was no grant of them to the defendants, and there is no foundation for regarding the defendant as the owners of the trees. The plaintiff was in possession of the trees until dispossessed by the defendants some two years prior to the suit. The defendants having no title as owners were mere trespassers, and the plaintiff was entitled to rely on his possession in a suit to eject them [*Narayana Row* v. *Dharmachar*(1) and *Subbaroya Chetty* v. *Aiyasami Aiyar*(2).]

On this ground we must set aside the decree of the District Judge and restore that of the District Munsif with costs in this and the lower Appellate Courts.

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(1) (1906) I L R, 26 Mad, 514 (2) (1909) I L.R., 32 Mad., 86

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

S. A. ANANTANARAYANA IYER AND THREE OTHERS (DEFENDANTS), APPELLANTS,

1911. December 1 and 14.

v.

SAVITHRI AMMAL (PLAINTIFF), RESPONDENT.*

Partition—Consideration—Bonâ fide claim for separate allotment for marriages of one brother's daughters—Agreement at or before partition to allot—Execution of promissory notes by each brother for his share of the amount—Previous suit for partition—Subsequent suit on promissory-note—Sec. 43, Civil Procedure Code (Act XIV of 1882), no bar—Causes of action distinct.

An agreement made between parties to a partition, by which one brother was to pay money for the marriages of his brothers' daughters, whether it is made before the partition and subsequently embodied in the deed of partition or made at the time of partition, is an enforceable contract, as the agreement by the father of the daughters to other terms of the partition is sufficient consideration.

A claim at the time of partition for the allotment of a separate sum of money out of the general funds for the performance of marriages of the daughters of one of the brothers to a partition is not altogether unfounded according to Hindu law. Even otherwise an agreement so to allot would be binding on the persons agreeing as one of the terms of a *bonâ fide* compromise constituting a settlement between the members of a family, if there was a *bonâ fide* claim for the same at the time of partition.

If an agreement so to pay a certain sum made by the other brothers at the time of partition becomes split up into various agreements by the execution of separate promissory-notes by the other brothers, each for his share, the obligation to pay the amounts of the promissory-notes is distinct from the obligation to observe the other terms of the partition, so that a suit first brought for partition against all the brothers (section 43, Civil Procedure Code, Act XIV of 1882), does not bar the institution of a subsequent suit for the sum due from one of the brothers under the promissory-note. "Cause of action" meaning of, explained.

Nanu v. *Raman* [(1892) I.L.R., 16 Mad., 335], *Sesha Ayyar* v. *Krishna Ayyangar*, [(1901) I.L.R., 24 Mad., 96.] *Umed Dholchand* v. *Pir Saheb Jiva Miya* [(1883) I.L.R., 7 Bom., 134] *Sundar Singh* v. *Bholu* [(1898) I.L.R., 20 All., 322] and *Moro Raghunath* v. *Balaji Trimbak*, [(1889) I.L.R., 13 Bom., 45], followed.

Appasami v. *Ramasami*, [(1886) I.L.R., 9 Mad., 279] and *Shanmugam Pillai* v. *Syed Gulam Ghose*, [(1904) I.L.R., 27 Mad., 116], distinguished.

Pramath Mukerji v. *Bishnath Prasad* [(1907) I.L.R., 29 All., 256] dissented from.

Per curiam.—If several promissory-notes are executed for portions of the same debt, each promissory-note creates a cause of action, and this would be so

* Second Appeal No. 913 of 1910.

SUNDARA AYYAR AND SPENCER, JJ. — ANANTANARAYANA IYER v. SAVITHRI AMMAL

even if it be assumed that a suit might be instituted for the whole debt on the original cause of action.

SECOND APPEAL against the decree of J. G. BURN, the Acting District Judge of Tanjore, in Appeal Suit No. 392 of 1909, presented against the decree of D. VENKOBA ROW, the Subordinate Judge of Tanjore, in Original Suit No. 5 of 1905.

The facts of this case are sufficiently set out in the judgment.

T. Rangachariar for first and second appellants and *V. Purushothama Aiyar* for the other appellants.

T. R. Venkatarama Sastri for the respondent.

JUDGMENT.—The suit out of which this second appeal arises was instituted on a promissory-note executed in favour of the plaintiff's husband by the first defendant on behalf of himself and as guardian of the second defendant who is his natural son given away in adoption to a brother of his. There were four brothers in an undivided Hindu family, namely, the plaintiff's husband Aiyaswami Aiyar, the first defendant, the second defendant's adoptive father and one Subramania Aiyar. Disputes arose between them in connection with the partition of their family property. Aiyasami Aiyar, the plaintiff's husband, was burdened with six daughters, only two of whom had been given away in marriage, several daughters of some of the other brothers had been married at the expense of the family. Aiyasami Aiyar made a claim that he was entitled to have an allotment towards the expenses of the marriages of his other daughters. The other brothers in settlement of this claim agreed to pay him Rs. 5,000. This agreement is one of the stipulations contained in the partition Karar, Exhibit C, dated the 5th September 1901. According to Exhibit C, they were bound to make the payment within three months by which time apparently the parties intended the partition would be completed. Lists of properties to be allotted to each of the co-parceners were drawn up on the 11th January 1902. As payment of the Rs. 5,000 promised had not been made to the plaintiff, two promissory-notes were executed for the amount. One of them, Exhibit A, for Rs. 3,333-5-4, and the other by Subramania Aiyar for the balance on 10th January 1902. The lower Courts have held the plaintiff entitled to a decree for the amount due on the promissory-note, Exhibit A. The defendants object to the decree on three grounds: (1) that there was no consideration in law for the promise to pay Rs. 5,000, (2) that the promise

was not of such a character as would be binding on the minor second defendant when made by his guardian, the first defendant, and (3) that the suit is barred by section 43 of the Civil Procedure Code.

The first contention may be disposed of in a few words. The appellant's argument is that the agreement to pay Rs. 5,000 was not one of the terms of the agreement between the parties for the division of the family properties, but an independent promise; that there was no obligation under the Hindu law on Aiyasami's brothers to contribute towards the expenses of his daughter's marriage and that there was, therefore, no legal consideration to support the promise. We are entirely unable to accede to this argument Paragraph 13 of Exhibit C says: "As it has been settled that for the expenses of marriages, etc., that have to be celebrated for the daughters of Aiyasami Aiyar, one of us, the other three co-parceners shall pay Rs. 5.000 in a term of three months from now: the said sum of Rs. 5,000 shall be accordingly paid off in cash in the aforesaid term." The natural construction of the clause is that the parties agreed under the instrument, Exhibit C, to pay the sum. But assuming that it had been previously settled that Rs. 5,000 should be paid to Aiyasami Aiyar, that fact would certainly make no difference for the effect of the clause is to make the previous agreement about the payment of Rs. 5,000, part of the agreement of partition which the parties were at perfect liberty to do. Mr. Rangachari attempted to perform the impossible feat of separating the promise contained in clause 13 from the other terms of Exhibit C, and he would regard the statement in paragraph 13 as a mere recital of an independent promise, even if the promise was made at the same time as the other terms in the Exhibit C were agreed to. He contends that the plaintiff himself so treated the matter in the plaint, but we can find nothing in the plaint to support the argument. He also relies on a sentence in Exhibit B, a letter written by the first defendant and Subramania Aiyar on the same day as they executed the promissory-notes, is which they say: "even though other matters relating to partition among us may not be settled, we shall pay off the said amount without raising any objection." But this does not show that the promise was a transaction independent of the agreement of partition. The object of the letter was merely to prevent the executants of the promissory-notes, in case litigation should ensue with regard to the enforcement of the

SUNDARA AYYAR AND SPENCER, JJ.

ANANTA-NARAYANA IYER v. SAVITHRI AMMAL.

agreement of partition, from resisting the payment of the amount of the promissory-notes until the other terms of the partition agreement were also fulfilled by the various parties thereto. In other words, the object was to prevent them from raising the plea that no term of Exhibit C could be enforced prior to the fulfilment of the other terms This does not show that the promise was not to be enforced as one of the terms of Exhibit C. It is not contended that the defence of absence of consideration could be set up if the promise be regarded as one of the terms of the contract of partition, as Aiyasami Aiyar's agreement to the other terms of the contract would then be sufficient consideration.

With regard to the second contention that the first defendant had no right to bind the minor second defendant by such a promise, the argument is that according to Hindu law there is no obligation on the part of co-parceners to provide at a partition for the marriages of the daughters of one of them out of the general family funds, and that it was therefore beyond the powers of the first defendant as a guardian to bind his ward for a purpose which created no legal obligation on the ward But it is clear that Aiyasami Aiyar made a claim that he was legally entitled to a provision for his daughter's marriages. Three daughters of the first defendant had been married at the expense of the family estate and the only daughter of Subramania Aiyar had been married and provided for out of joint family funds. There is no reason for supposing that Aiyasami did not believe that he had ground for making the claim or that the first defendant did not believe that there were some grounds for the claim. Nor can we assume that the claim was altogether unfounded according to Hindu law, although the plaintiff's pleader in the Court of First Instance seems to have conceded that the claim could not be enforced by a Court of law Further, it appears from paragraph 12 of the Subordinate Judge's judgment that there were other matters in dispute between Aiyasami Aiyar and his brothers. All of them were settled by Exhibit C, and it is impossible to separate the promise contained in paragraph 13 from the other terms of Exhibit C, and to test its validity by a consideration merely of the abstract legal question which is raised to resist the promise. We must uphold it as one of the terms of a *bonâ fide* compromise constituting a settlement between the members of the family.

SUNDARA AYYAR AND SPENCER, JJ.

ANANTANARAYANA IYER v. SAVITHRI AMMAL.

We now proceed to the consideration of the last question whether the suit is barred by section 43 of Act XIV of 1882. The defendant's contention is that the plaintiff should have included the present claim in the Suit No 31 of 1904 on the file of the Additional Subordinate Court of Tanjore instituted by the plaintiff's husband against the defendants and Subramania Aiyar for division of the family properties. The learned vakil for the appellants contends that the cause of action was the same in both suits, namely, the agreement of partition, Exhibit C, and that the suit is therefore barred by section 43. The argument is fallacious for several reasons In the first place the present claim is one against the first and second defendants only, while the right to division of the properties was against all the members of the family including Subramania Aiyar. [See *Nanu* v. *Raman*(1).] Secondly, the parties agreed to execute separate promissory-notes for the sum of Rs. 5,000, Exhibit A, being executed by defendants Nos 1 and 2 and another promissory-note by Subramania Aiyar for the remainder of the amount. The original agreement to pay Rs. 5,000 was thus split up into two contracts. In Exhibit B, the letter already referred to, the first defendant and Subramania Aiyar say : "As we have not found it convenient to settle it now (that is, the payment of Rs. 5,000) according to the aforesaid arrangement" (that is, to pay the amount within three months from the date of Exhibit C), "we have on this date separately executed promissory-notes to you for the said amount and thereby the said matter has been settled." In other words, the obligation created by Exhibit C is regarded as discharged by the execution of two different promissory-notes. There can therefore be no doubt that the promise contained in paragraph 3 of Exhibit C became separate from the other obligations contained in that instrument and was split up into two different obligations by two promissory-notes. Each promissory-note therefore furnished a separate cause of action different from the obligation existing under Exhibit C. Thirdly, even apart from the effect of Exhibit B, we have no doubt that although the original obligation may be single and entire, if the parties agree to execute a separate document for a part of the obligation that document will constitute a distinct cause of action. It

(1) (1893) I.L.R., 16 Mad., 335; (1890) Punjab Rep., 34.

SUNDARA AYYAR AND SPENCER, JJ.

ANANTANARAYANA IYER v. SAYTHRI AMMAL.

Sesha Ayyar v. *Krishna Ayyangar*(1) a sum of Rs. 10,500 was found due by a debtor, and for this amount two mortgage bonds were executed by him, one for Rs. 10,000, and the other for Rs. 500 on the same date. It was contended that a suit instituted on the bond for Rs. 10,000 was barred by a previous suit on the one for Rs. 500. SHEPHARD and DAVIES, JJ., held that it was not. The learned Judges say: "It may be true that the term 'cause of action' is used in that section in a peculiar way, but we do not think that when parties, for whatever reason, choose to agree that there should be two instruments and two obligations, the Courts are justified in saying that there is only one obligation." The same view was held in *Umed Dholchand* v. *Pir Sāheb Jiva Miya*(2). Therefore for the amount due on a previous bond, two different bonds were executed by the debtor. SARGENT, C.J., and MELVILL, J., held that the bonds furnished different causes of action for purposes of section 43. Their Lordships say: "There can be no doubt that the two bonds and the default in payment of them constitute, in any view of the expression 'cause of action,' two distinct causes of action and there is nothing, we think, in the language of the section (which would appear to have been mainly designed to discourage multiplicity of suits) which would justify the Court in going behind the bonds to consider the circumstances out of which they sprung, albeit those circumstances might themselves at the time have constituted a cause of action" [see also *Sundar Singh* v. *Bholu*(3) and *Moro Raghunath* v. *Bālāji Trimbak*(4)]. It is immaterial, as pointed out by the Bombay High Court, for the decision of an objection under section 43 to consider whether a suit could have been instituted on the original indebtedness, apart from the promissory-notes. It is often the case, no doubt, where a promissory-note is executed for a previously existing debt that an action may be maintained on the debt, apart from the promissory-note. And it is sometimes necessary to do so, as when the promissory-note is unenforceable for defect of stamp or otherwise. But this does not show that the promissory-note itself is not a cause of action. There are two causes of action in such a case on either of which a suit may be maintained. The presumption would, ordinarily, be that the cause of action for the debt is merged in the promissory-note. But there would be

(1) (1901) I.L.R., 24 Mad., 96 at p. 100. (2) (1883) I.L.R., 7 Bom., 134.
(3) (1898) I.L.R., 20 All., 322. (4) (1889) I.L.R., 13 Bom., 45.

no effective legal merger where the promissory-note cannot be sued on. If several promissory-notes are executed for portions of the same debt, each promissory-note creates a cause of action, and this would be so, even if it be assumed that a suit might be instituted for the whole debt on the original cause of action. If the creditor neglecting one of the promissory-notes institutes a suit for the amount secured by it on the original cause of action, then no doubt he would not be entitled to maintain another suit for the remaining amount on the original debt. But no difficulty can arise under section 43 where the former suit was instituted on one of the promissory-notes. In such a case he could claim no more than the amount secured by the particular promissory-note. That promissory-note is not a cause of action on which he could claim the balance of the debt Section 43 compels a person only to include the whole of the claim arising from the same cause of action. It does not require him to include what he could claim on a cause of action distinct from that which he sues on. Mr. Rangachari has referred to three cases in support of his contention: *Appasāmi* v. *Rāmasāmi*(1), *Shanmugam Pillai* v. *Syed Gulam Ghose*(2) and *Preonath Mukerji* v. *Bishnath Prasad*(3) In the first of these, *Appāsami* v. *Rāmasāmi*(1) upon a settlement of accounts a sum of money was found due to a creditor which the debtor agreed to pay. He gave the creditor an order on his agent to pay a portion of the amount from the profits of certain land and promised to pay the balance within a month. The agent having failed to make payment, two different suits were instituted on the same day against the debtor for the amount which he had directed the agent to pay and for the balance, respectively. It was contended that both suits were barred by sections 42 and 43. BRANDT and PARKER, JJ., held that the giving of the order on the agent was not similar to the execution of a promissory-note so as to give the creditor a separate cause of action for the amount of the order, and that the cause of action for the whole amount remained the same. They distinguish the case from *Umed Dholchand* v. *Pir Sāheb Jiva Miya*(4) and hold that one of the suits must be held to be barred. That case is clearly not analogous to the present one where a distinct source of obligation was created by the execution of the promissory-note. In the second case *Shanmugam*

(1) (1886) I.L.R., 9 Mad., 279.
(2) (1904) I.L.R., 27 Mad., 116.
(3) (1907) I.L.R., 29 All., 256.
(4) (1883) I.L.R., 7 Bom., 134.

SUNDARA AYYAR AND SPENCER, JJ.

ANANTANARAYANA IYER v. SAVITHRI AMMAL.

Pillai v. *Syed Gulam Ghose*(1). An inamdar obtained separate muchilikas from the occupying ryot of his land for two different years. He first instituted a suit for rent for the later year and subsequently instituted another for the rent of the earlier year. BENSON and BHASHYAM AIYANGAR, JJ., held that the second suit was barred. The judgment was based on the ground that the muchilikas did not furnish the cause of action for rent. They apparently regarded a muchilika as merely evidence of the terms of the tenancy between the landholder and the ryot. They observe that "though there were separate muchilikas for faslis 1306 and 1305, yet there was but one cause of action, viz., non-payment of rent by a tenant to his landlord. Though the rents became payable under different documents and at different times, they are only different claims under the same cause of action or tenancy. The case is very similar to the case where several articles are sold in succession by *A* to *B*. If the vendor sues for the price he must sue for the price of all the goods sold up to the date of his suit and cannot sue separately first for one and then for another." In the third case *Preonath Mukerji* v. *Bishnath Prasad*(2) "*A*, *a doctor, agreed with B to accompany B to* Hardwar as his medical attendant on a fee of Rs. 100 a day. After seven days *B* gave *A* a promissory-note for Rs. 700, representing seven days' fees. *B*, who was a vakil, also promised to assist *A* professionally in certain litigation. *B*, however, died before he could fulfil his agreement to render professional services. *A* sued *B's son upon the promissory note first, and subsequently* in a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares." It was held that the second suit was barred by the provisions of section 43 of the Civil Procedure Code so far as the fees for attendance at Hardwar were concerned though not in respect of the other fees claimed. The learned Judges, STANLEY, C.J., and BURKITT, J., say that the cause of action for medical fees was the same in both cases and that it was in reality the breach of the agreement to pay a fee of Rs. 100 per day for attendance on the deceased. They observe: "It is true that Raghunath Prasad executed a promissory-note to secure the payment of Rs. 700 on account of fees for seven days, but the fact that this security was given does not take the case out of section

(1) (1904) I.L.R., 27 Mad., 116. (2) (1907) I.L.R., 29 All., 256.

43 because of the proviso to that section which is in the following terms:—' For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.' The contention, therefore, that the cause of action on the promissory-note is one cause of action, and the cause of action for the recovery of the balance of Rs. 600 forms another cause of action, is not well founded." With all deference we are unable to agree with the learned Judges that a promissory-note executed for payment of a debt is ordinarily to be regarded merely as a collateral security for the debt. The deposit of title-deeds or mortgage as security is only an accessory right to secure the rendering of the main right, namely, the debt. But a promissory-note is *primâ facie* to be regarded as the record intended by the parties of the obligation to pay the debt. The decision is not in accordance with the cases already referred to above including the judgment of the Allahabad High Court in *Sundar Singh* v. *Bholu*(1) which is not referred to in the judgment.

SUNDARA AYYAR AND SPENCER, JJ.

ANANTANARAYANA IYER v. SAVITHRI AMMAL

For the reasons mentioned above we hold that the present suit is not barred by section 43 of the Civil Procedure Code. We dismiss the Second Appeal with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

In re B VENKATA ROW (FIRST PRISONER), APPELLANT.*

1912. December 4, 5 and 29

Evidence—Expert in handwriting, value to be attached to evidence of—Corroboration of such evidence.

An accused should not ordinarily be convicted of forgery upon the uncorroborated testimony of a handwriting expert.

The value to be attached to the evidence of handwriting experts discussed

APPEAL against the decree of V. VENUGOPAUL CHETTI, the Sessions Judge of the South Canara division, in Calendar Case No. 19 of 1910.

The facts of the case are fully set out in the judgment of SUNDARA AYYAR, J.

Messrs. *Kunjunni Nair* and *G. Annaji Rao* for the appellant.

The Public Prosecutor opposing.

(1) (1898) I.L.R., 20 All., 322

* Criminal Appeal No. 324 of 1911.

SUNDARA AYYAR AND SPENCER, JJ.

In re VENKATA ROW.

SUNDARA AYYAR, J.—The appellant, who was the first accused in Sessions Case No. 19 of 1910 in the Sessions Court of South Canara, was tried along with two other persons, the appellant for the forgery and the two others for abetment of the forgery of certain documents. These documents were certain income-tax records in the Udipi Taluk office and in the office of the Head Assistant Collector of South Canara. The forged documents related to the assessment to income-tax of one Vishnumurti Upadhyaya for the year 1905–1906. The prosecution alleges that the B Schedule of income put in by Vishnumurti under the Income-tax Act, the Takid issued to the village officers of Gundmi to send a report, the Takid issued to the Potel of Gundmi to communicate to the assessee the order of confirmation of the tax, the deposition of Vishnumurti before the village officers, the deposition of Venkatramana Bhatta (a witness) before them, the list of the houses prepared by the Shanbhog and the report submitted by him to the Tahsildar were all replaced with forged documents in substitution for the original ones, and that an interpolation was made in the deposition of Vishnumurti before the Head Assistant Collector after the confirmation of the tax. Three of the above documents were selected as the subject-matter of the charges against the accused, namely, the deposition of Vishnumurti before the Tahsildar, Exhibit B, the B Schedule put in by him, Exhibit Y, and the interpolation in his statement before the Head Assistant Collector, Exhibit H, Exhibit H-1 being the interpolation. These forgeries are alleged to have been made in the interest of one Nagappa Hande. Nagappa was also charged with forgery before the Committing Magistrate but died after his commitment to the Sessions Court. These two persons, Nagappa Hande and Vishnumurti, financed one Tammaya Urala in 1897 in a partition suit instituted by Tammaya Urala against his undivided co-parceners. Nagappa obtained a mortgage bond from Tammaya Urala and executed a mortgage himself in favour of Vishnumurti on the 24th March 1898. Nagappa alleged that the mortgage debt due to Vishnumurti by him was discharged except a small portion. In 1908 Vishnumurti filed a suit in the District Court of South Canara on the mortgage-deed and produced a copy of it. The suit was transferred to the Sub-Court where it was registered as Original Suit No. 53 of 1909. According to Vishnumurti and the prosecution case here, Nagappa made no payment whatever

towards the mortgage. Nagappa in support of his plea that the major portion of the debt had been paid off produced along with his written statement certain correspondence which he alleged passed between him and Vishnumurti in 1898, 1899, 1904, 1905 and 1906, as well as receipts and acknowledgments for payments made by him. Vishnumurti denounced those documents as forgeries. When Vishnumurti was being cross-examined in the Sub-Court as a witness he was shown certain certified copies of income-tax proceedings relating to him and cross-examined with reference to them. He denounced these also as forgeries. They were not filed in the Sub-Court, though the plaintiff Vishnumurti and the Court called upon Nagappa Hande to produce them. Nagappa applied for copies of these income-tax proceedings in February 1909; these certified copies were the documents used at the cross-examination of Vishnumurti. The first accused is alleged to be the writer of these forged documents. He is a petition writer by profession, the second and third accused were respectively an attender of the Head Assistant Collector's office and the record-keeper of the Udipi Taluk office. They are alleged to have helped Nagappa in obtaining the records of these two offices. The Sessions Judge after a very elaborate enquiry convicted the first accused and acquitted the second and third accused The first accused has appealed to this Court from his conviction.

Most of the evidence in the case was adduced for proving that the documents in question including those which formed the subjects of the charges against the accused were forgeries. The major portion of the judgment of the learned Sessions Judge is also devoted to the establishment of that proposition. The appellant has not contended before this Court that that finding is wrong. The question we have to decide is whether the prosecution has satisfactorily proved that the appellant was the writer of Exhibits B, Y and H-1. There is no direct evidence on record that the accused was the forger. The conviction is based on the evidence of prosecution witness No. 12, Mr. Charles Hardless, Government Handwriting expert, who was examined to prove that these documents are in the handwriting of the accused, and on certain other evidence which was relied on in corroboration of the evidence of prosecution witness No. 12. It will be convenient to examine the corroborative evidence before proceeding to deal with the evidence of the expert.

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The facts alleged to corroborate the expert evidence are these :—

(1) that the accused was on intimate terms with Nagappa and used to write documents for him and others connected with him ;

(2) that the accused visited Nagappa in January 1909 when, according to the prosecution, the forgeries must have been committed ;

(3) that the accused received a considerable sum of money from Nagappa in 1909 and that the latter raised a loan from one Mahabala Rao, prosecution witness No. 37, in January 1909, apparently to be paid to the accused ; and

(4) that the accused was a man who used to forge documents as shown by Exhibit YYYYY discovered at a search of his house, a paper containing the signatures of certain persons in the handwriting of the accused.

[His Lordship in reviewing the facts held that the first fact was proved but that the second, third and fourth facts were not proved and continued] :

The expert compared the handwriting in the documents in question with the writing in exhibits XXXXX, YYYYY, ZZZZZ, CCCCCC and WWWWW. The first question in determining the value of his evidence is whether these documents have been proved to be in the handwriting of the accused. It may be taken as proved, as already stated, that the accused was residing in the house where they were found. The only evidence to prove that they were written by the accused is that given by prosecution witness No 44. His evidence is most unsatisfactory. He simply says that these documents are in the handwriting of the appellant; he does not say either in examination-in-chief or in cross-examination how he was acquainted with the appellant's handwriting. A bald statement like the one made by him is not legal evidence of any knowledge of the accused's handwriting. In the course of the re-examination however in answer to questions put by the Court he said : " I came to be acquainted with the first accused's writing only by seeing him write documents ; I think he has written ten or fifteen documents for me." He does not say how many years before he gave evidence he saw the appellant write or how long ago the appellant wrote documents for him. There is perhaps enough in the statement (just referred to) made by him at the

very end of his examination, to make his evidence legally admissible, but it is, to say the least, of the weakest kind. The learned Public Prosecutor drew the attention of the Court to the nature of the documents as probabilising the fact that they are in the accused's writing. Exhibit XXXXX is a note-book containing various scientific and technical English words with their corresponding Canarese equivalents. Exhibit ZZZZZ is a note-book containing entries relating to the construction of some building, but there is nothing in it to show what the building is. Exhibit YYYYY, as already stated, consists of imitation signatures of certain persons. Exhibit CCCCCC is a registered document purporting to be written and attested by the accused, but it is not a document purporting to be 30 years old and requires to be proved like any other document. The question whether the standard writings compared by the expert with disputed ones are properly proved is a matter of great importance when it is sought to prove that the disputed writings are in the handwriting of a particular person, and it was the duty of the prosecution to adduce much more satisfactory evidence to show that the documents given to the expert for comparison were in the handwriting of the appellant

Assuming that these documents are in the handwriting of the appellant, can the evidence given by Mr. Hardless be taken as sufficient in itself to prove that Exhibits B, Y, and H-1, are in the handwriting of the accused? His reason for the conclusion arrived at by him is as follows: "All these writings (*i.e.*, the standard writings given to him for comparison and the disputed writings) are the handiwork of one and the same person All these writings are of the wrist movement, with the pen-presentation between 45 and 55 degrees, of even pen-pressure, of regular sizing whether the writings be large or small or wide, of varied direction, of linear and oval sometimes inclining to roundness in style, of ascendant alignment, of even spacing and of well-formed thumb and finger curves." Describing the writing of Vishnumurti he describes it thus "Of the superior finger movement, of a pen-presentation of 35 degrees, of an even medium pen-pressure, of medium sizing, sloping direction, easy execution, close spacing, ascendant alignment, and of ordinary defined finger and thumb curves." It will be observed that with regard to pen-pressure, sizing, alignment and finger and thumb curves, the witness points to no great difference. The differences no doubt are more

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prominent in some respects; in the one case it is wrist movement, in the other case superior finger movement. There is also appreciable difference in the angle of the pen-presentation and in the direction. But can it be said that the resemblances between the accused's writing and the disputed writings in these few respects are sufficient to prove with reasonable certainty that the latter are in the handwriting of the accused? In cases where a conclusion was based regarding the authorship of a document on a comparison of writing, the expert was generally able to point to marked peculiarities in the ordinary writing of the accused which are reproduced in the forged documents, the accused being unable to avoid them. No peculiarity or mannerism of such sort is spoken to by Mr. Hardless. Daniel Ames in his work on forgery observes: "Where a handwriting is brought into question, it is rare that any one thing can determine the point at issue. It is usually by a more or less extended series of things, the presence or absence of which creates the decisive preponderance of evidence" (page 100). At pages 104 and 105 and in the succeeding pages will be found the manner in which experts in the cases mentioned there were able to bring home to the Court the decided peculiarities which proved the forgery. The learned vakil for the Appellant also drew our attention to the fact that in this case all the standard writings were put together and the disputed ones also put together separately and the expert was asked to compare the writings of the one group with those of the other. I by no means doubt that Mr Hardless carried out his comparison with perfect *bonâ fide*, but it is unfortunate that the expert knew what the prosecution wished to be proved, and that circumstance must in my opinion detract to some extent from the weight to be attached to the expert's testimony. On reference to KKKKKK it is found that Mr. Hardless before the Committing Magistrate merely deposed that in his opinion the disputed documents were in the handwriting of the accused; he gave no reasons for his opinion. Again I accept Mr. Hardless' *bonâ fides* as unimpeachable, but the prosecution would have done well to avoid all room for the observation that the witness committed himself at the preliminary enquiry to an opinion given without reasons and then gave reasons for them at the trial before the Sessions Court. He does not say that the handwriting of the accused is in any way peculiar or eccentric, a circumstance which would attach particular weight to evidence of comparison.

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I am unable by the application of any facts stated in the expert's evidence as to the writings before the Court to come to the conclusion that exhibits B, Y and H-1, are in the handwriting of the accused. In *Lalta Prasad* v. *Emperor*(1), Pandit SUNDAR LAL, Assistant Judicial Commissioner of Oudh, refused to convict the accused on the uncorroborated evidence of the handwriting expert who happened to be the same as in the present case. The learned Judge found that the corroborative evidence in the case was valueless in that there was no marked peculiarity in the handwriting of the accused or anything rare in its style The learned Judge quotes the following passage from Dr. Lawson's work on the "Law of expert and opinion evidence":—"The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced laymen unite with the members of the legal profession. Of all kinds of evidence admitted in a Court this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence" This passage possibly states in too depreciatory terms the value of export evidence I am quite prepared to concede that there may be cases in which the peculiarities in the handwriting of a person are so numerous and striking and there are so many mannerisms of the forger that he has been unable to avoid in committing his forgery that the Court might well come to the safe conclusion on expert evidence alone that the writing is that of a particular person But no help of this kind is afforded us in this case by Mr Hardless Again, this case must be distinguished from those where several independent experts have arrived at the same conclusion by their independent efforts Pandit SUNDAR LAL, J., refers to two judgments of the Allahabad High Court *Srikant* v. *King-Emperor*(2) and *Kali Charan Mukerji* v. *King-Emperor*(3) In the former case BLAIR and KNOX, JJ., observe that "to base a conviction upon the evidence of an expert in handwriting is, as a general rule, very unsafe" and in the second case Justices RICHARDS and GRIFFIN approved of the above observation.

(1) (1910) 11 Cr.L J, 114. (2) 2 All L J, 444

(3) (1909) 6 All. L.J.,184; S C. (1909) 9 Cr.L.J., 498.

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In the second case no doubt there were improbabilities arising from the circumstances of the case in the story for the prosecution, but the observations of the learned Judges with regard to the value of expert evidence are none the less valuable. I have no hesitation in the present case in refusing to find the accused guilty on the evidence of prosecution witness No. 12 alone without substantial corroboration. I would therefore reverse the conviction of the accused and direct that he be released from custody.

SPENCER, J.—I agree with my learned brother in thinking that this is not a case in which a conviction can be supported upon the uncorroborated testimony of the handwriting expert; and the corroborative evidence available on the record against the first accused is of the weakest description, and in fact does little more than create a certain amount of suspicion that he may have had a hand in the forgeries

A number of forged documents are alleged by the prosecution to have come into existence, some in 1900 and some about January 1909.

The Sessions Judge finds traces of a conspiracy to assist the deceased Nagappa Hande in the commission of frauds, and four conspirators are named. None of these four were accused at the trial in the lower Court, no connection has been established between them and the appellant, and nothing has been done to eliminate the possibility that the forgeries which the appellant is charged with committing were perpetrated by one of those persons. The handwriting expert was not so much as asked his opinion as to the authorship of exhibits JJJ to ZZZ of which exhibits JJJ to TTT must have been in existence when the written statement RRRRRR, dated the 16th January 1901, was filed in O.S. No. 45 of 1900.

Amid a mass of alleged forgeries which other persons are alleged to have conspired to forge, the appellant is charged with forging three documents, or parts of documents, one in English and two in Canarese, on the strength of resemblance detected by the expert between these writings and certain so-called genuine writings of the appellant In paragraphs 26 and 40 of his judgment the learned Sessions Judge refers to exhibit XXXXX series, ZZZZZ series and WWWWWW series and exhibit CCCCCC, as being the admitted writings of the first accused. In this Court at

the hearing of the appeal all admission of these documents being in appellant's handwriting is on his behalf repudiated. There is no record of any such admission having been made by him or by any person authorised by him. Neither in his statement in the Sessions Court nor in his statement in the Committing Magistrate's Court was the first accused asked whether any documents were in his writing.

Prosecution witness No. 44 who stated in answer to a question put by the Court that he had seen the first accused write documents, declared that exhibit W series and the Canarese portion of exhibit XXXXX and of exhibit ZZZZZ and the first page of exhibit YYYYY were in his writing, but this witness does not know English and had not seen the first accused write English. Prosecution witness No. 45, who was living in the first accused's house, stated at the search that the writing on some of the papers found at the search was the first accused's but did not clearly specify which those were. At the trial in the Sessions Court he seems to have turned hostile to the prosecution and did not identify any documents to be in the first accused's writing. He further stated that the room where they were found was never occupied by the first accused, but he only took his food there with his sister, the sole occupant. The prosecution is thus left without a satisfactory basis of genuine writings to be used for comparison with what are alleged to be forgeries, and no English writings of the appellant have been proved to be his for the purpose of comparison.

Turning now to the circumstantial evidence against the appellant, there are four matters which suggest a certain amount of suspicion as to his conduct. They are (1) that he was seen in Nagappa Hande's house on two occasions engaged in some writing business and was supplied by Nagappa Hande with food for seven or eight days on the first occasion, (2) that the appellant was spending money on a weaving establishment at a time when Nagappa Hande is proved to have been borrowing, (3) that a letter, exhibit CC, addressed to Nagappa Hande by the appellant asking the former to send him Rs. 50 and suggesting that relations of confidence and dependence that existed between them was found at the search of the house occupied by the appellant's sister, (4) that the appellant was skilled in imitating handwriting and that experiments in copying signatures were found on a scrap of paper (Exhibit YYYYY) at the said search.

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[His Lordship here reviewed the evidence on these points and held that if the first was proved it was of no value and that the second, third and fourth were not proved and continued.]

I consider the present case to be one in which it would be dangerous to act on the uncorroborated evidence of the handwriting expert. The conviction of the first accused must be set aside and his release ordered.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 17 and 27

M. LAKSHMAYYA AND OTHERS (DEFENDANTS), APPELLANTS.

v.

SRI RAJAH VARADARAJA APPAROW BAHADUR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Evidence—Private knowledge of facts by Judge, how far may be relied on by him—Savaram *lands—Meaning of* Savaram—*Madras Estates Land Act (I of 1908), sec. 185—construction of.*

Where the Judge used knowledge gained by him from his own experience as to scarcity of land for cultivation (although his knowledge was partly derived from facts relating generally to the lands in the zamindari of Nuzvid in which the lands in suit were situated)

Held, that the fact of which he had such knowledge was merely a fact of economical history and that he had not acted illegally in relying upon it.

Per SUNDARA AYYAR, J.—"A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise but he may use his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in dispute in the case."

Per SADASIVA AYYAR, J.—"I think the only practical rule which can be laid down in these cases is that if a Judge knows of his own knowledge as an individual observer of a past relevant concrete, private incident, and that fact cannot be subjected to ocular proof at the time of trial (such as a person's colour, resemblance of features, appearance, behaviour, chemical experiments on the present condition of the object), and if the truth of such incidents is contested between the parties, he should mention his private knowledge of such incidents to the parties and he should refuse to be the Judge in that case, unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge.

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* Second Appeals Nos. 575 to 579 and 581 to 586 of 1911

In the present case, the learned Judge has not gone further than to use the general knowledge which he has acquired as a past revenue officer and as a revenue Court of experience in the course of the performance of his duties in zamindari tracts; and I hold that he was entitled to use such knowledge in coming to a conclusion on the facts after the consideration of the evidence let in in this case."

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

LAKSHMAYYA v. SRI RAJAH VARADARAJA APPAROW BAHADUR.

Per Curiam.—The word *savaram* as applied to lands does not necessarily convey the idea of full proprietary right in the zamindar. All that is clear is that *savaram* was compensation granted to a zamindar or Revenue Officer under the Muhammadan Government.

Per Curiam.—Where pattas entered into in 1897 evidenced agreements to lease operating from 1st July 1898, *Held*, that section 185 of the (Madras) Estates Land Act (Act I of 1908) does not preclude the Court from taking such pattas into consideration, it being the date of the contract that is material in deciding whether the evidence is admissible.

Per SUNDARA AYYAR, J.—The Act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is private land and it cannot be held that all evidence as to leases subsequent to 1st July 1898 is shut out altogether.

Per SADASIVA AYYAR, J.—Evidence as to leases granted after 1st July 1898 is shut out by section 185 if the leases are sought to be used for the purpose of proving the character of the tenure of the land.

SECOND APPEALS against the decrees of T. A. COLERIDGE, the Acting District Judge of Kistna at Masulipatam, in Appeals Nos. 149 to 153, 155, 156, 158, 159, 161 and 162 of 1910, presented against the decrees of A. VENKATARAMIAH, the District Munsif of Gudivada, in Original Suits Nos. 268, 269, 272, 275, 367, 370 and 371 of 1908, 209 of 1909, 377 of 1908 and 210 of 1909 respectively.

In this case the plaintiff (respondent in the High Court), the Zamindar of Gannavaram, sued to eject the defendants (appellants in the High Court) from certain lands in Manikonda, claiming that they were *savaram* lands in which he possessed both the kudivaram and melvaram rights. He pleaded that he had leased out the lands temporarily. The defendants denying the plaintiff's kudivaram right, claimed occcupancy right; and contended that the Civil Court had no jurisdiction to entertain the suits as the lands were not private lands. The Court of First Instance found on these points in favour of the defendants. On appeal the District Court reversed this decision holding that the lands were private lands in which the zamindar possessed both the kudivaram and melvaram rights. In the course of his judgment the District Judge held that *savaram* meant the actual grant of land and not of land revenue In doing so he stated:

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.
—
LAKSHMAYYA v. SRI RAJAH VARADARAJA APPAROW BAHADUR.

"Both parties agree the lands were from a very long time described as *savaram* in the oldest accounts available. *Savaram* is defined in Wilson's Glossary as "an allotment of land, or of the Government revenue derivable from it assigned by the Muhammadan Government to the zamindars or other Revenue officers as their personal compensation." It is also explained as that part of the zamindari which the zamindar retained in his own hand.

Sir C. Wilkins in his Glossary appended to the 5th report from the Select Committee, Vol. II, 1812, defines *savaram* as "an allotment of land or of the Government revenue thereof, held by the zamindars and other Principal Revenue officers, rent free as part of the emoluments of their offices."

At page 7, Vol. II of 5th report of Select Committee, Grant's Report on page 155, Mr. Grant deals with Deshmuks and the grant to them of a proportion of the revenue collected and also the grant of private lands to them in various villages to induce them to travel about their division :—These grants of land are described as *savaram*.

Mr. Grant here writes as if the land were the grant and not revenue on the land. He describes it as "*a small allotment of land freed from any public encumbrances.*"

If we are to accept this, *savaram* can only mean a grant of land and not a grant of land revenue.

Referring to Baden-Powell where he deals with *Nankar* which is the corresponding word to *savaram*, *nankar* is defined "as a *money allowance* (or free land)"—*vide* also Vol. I, page 514, where he explains that at first it was money (bread allowance) but, later on, land, revenue *free*, was given. I am therefore of opinion that the *savaram* lands of the zamindar were granted as land and not as land revenue. This is the view that has been taken for a long series of years. *Vide* Glossary of Vol. III of Madras Manual of Administration, 1893. Also in the opening speech of Mr. Forbes in introducing the Land Estates Act, he then gave a definition of *savaram* which clearly conveyed the impression that *savaram* was the actual land and not the revenue. Such speeches are of course not direct evidence [vide *Administrator-General of Bengal* v. *Premlal Mullick*(1)] but can be used to sum up a long series of definitions showing that in this Presidency at least *savaram* was the actual grant of land and not of land revenue.

(1) (1895) I.L.R., 22 Calc., 788 (P.C.).

The District Judge on a consideration of the documentary evidence produced further found that *savaram* lands had always been treated by the zamindar on a different basis from certain other lands termed *seri* lands in which he possessed rights inasmuch as the two classes of land were kept separate, that he himself paid the Government water-rates on *savaram* lands whereas the ryots paid them on *seri* lands, and that in the survey of 1870 the two classes of lands were separately numbered in two series and against all *savaram* numbers the zamindar's name was entered and not that of the cultivating tenants Further in 1897 and 1898 the new pattas contained explicitly the statement that "as the land is your *savaram* land, we tenants, have no *jeroyati* right."

It was urged by the defendants that the insertion of this clause was without the knowledge of some of the ryots who were parties thereto. Three witnesses were called who denied that they were aware of it These the District Judge disbelieved and among his reasons for doing so he stated :—

"It has to be remembered that in 1896 there was no great demand for land, thousands of acres of Government land in the delta were being given away or sold at low rates and zamindari tenants had to be almost coerced into cultivating many of the zamindari lands in the Nuzvid zamindari. The zamindars refused relinquishments and resorted to many tricks to keep their tenants. A ryot therefore did not blindly accept terms, though, provided the land was good and near his village, he was content to pay more rather than move and cultivate other lands.

The above paragraph is my own knowledge of the district at the time from summary suits and acquisition cases and is only imported into the judgment to show how I arrive at my reason for believing the evidence of plaintiff's sixth witness rather than defendants' witnesses Nos. 1, 2 and 3."

The District Judge further found that the zamindar had not surrendered his rights to the cultivators.

In the result he ordered ejectment as prayed by the zamindar and decreed mesne profits.

The defendants appealed to the High Court.

The Hon. Mr. *T. V. Seshagiri Ayyar* and *T. V Muttukrishna Ayyar* for appellants

The Hon. Mr. *L. A. Govindaraghava Ayyar* and *P. Nagabhushanam* for respondent.

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SUNDARA AYYAR, J.—These are appeals by ryots in the village of Manikonda in the proprietary estate of Gannavaram against whom decrees of ejectment were passed by the District Court of Kistna reversing the decrees of the District Munsif of Gudivada who held that the ryots possessed occupancy right in their lands and could not be ejected. The lands in question were asserted by the proprietor to be his private lands in which both the melvaram and kudivaram rights were vested in him He alleged that both by custom and contract he was the full proprietor and that the tenants had no occupancy rights. The defendants, on the other hand, asserted that they were part of the public lands of the estate held by the ryots with occupancy rights. They were undoubtedly known as *savaram* lands and were described as such in the pattas, muchilikas and leases executed between the parties. The plaintiff contended that the word *savaram itself* indicated his full proprietary right in the land. The District Munsif denied this, but the District Judge accepted the interpretation claimed for the plaintiff. We are of opinion that on this point the District Munsif was right in holding that the word did not necessarily import the absence of kudivaram right in the cultivating ryot. Wilson's and Wilkins' 'Glossaries' cited by the District Judge are both opposed to the interpretation accepted by him. Both these learned writers define *savaram* as an allotment of *land or of the Government revenue derivable from it held* by zamindars or other Revenue officers under the Muhammadan Government as their personal compensation for services rendered by them. Mr. Grant, the author of the 'Survey of the Northern Circars,' no doubt describes it as a grant of land. See pages 7 and 155 of Vol. II of the *Fifth* report of the *Parliamentary* Committee. The word is supposed to have the same meaning as *nankar* in Bengal. The latter word is defined by Baden-Powell as a "money allowance" (or free land). In Maclean's 'Manual of Administration,' 1893, *savaram* is treated as a grant of land. All that is clear, however, is that *savaram* was compensation granted to a zamindar or Revenue officer under the Muhammadan Government. Sometimes the zamindar was a descendant of a royal family that enjoyed demesne or private lands and remained in possession of them after the family ceased to exercise sovereign powers, but continued to have zamindari rights under the Muhammadan rulers. The holder was allowed to retain these private lands as compensation for services rendered by him to

the State and partly also in consideration of his being responsible for the collection and payment of the State revenue. The private land in his own occupation was itself exempt from the payment of any revenue. But the zamindar was sometimes a mere renter under Government holding his office at its pleasure. In such cases some land was sometimes granted to him and exempted from the payment of revenue. But if no land was available, the grant to the zamindar would consist merely of the revenue on a portion of the lands for the assessment of which the zamindar was responsible to the State This is the view taken both by Wilson and Wilkins. The materials available for the interpretation of the word do not justify the Judge's view that *savaram* necessarily conveys the idea of full proprietary right in the zamindar. In Second Appeals Nos. 994 to 1024 of 1902 relating to the same estate certain *savaram* lands were held not to be the zamindar's private property. In Second Appeals Nos 518 and 519 of 1910 also, which came up from the same district *savaram* lands were held not to be the same as private lands. Mr. Seshagiri Aiyar, the learned vakil for the appellants, contends that the finding of the District Judge against his clients is completely vitiated by the Judge's interpretation of the word *savaram*. This argument is not without foundation. The Judge observes "starting then with this finding (*i.e.*, that *savaram* was the actual grant of land and not of land revenue) we have to see whether the lands claimed now as *savaram* by the appellants were the original lands granted to him by the original sovereign or were so accepted by the permanent settlement or have so long been treated as *savaram* as to justify their acceptance as original *savaram*." There was, however, no serious dispute between the parties before the District Munsif that the lands in question were designated as *savaram* in the documents relating to them. In appeal an attempt was made to show that in two cases, lands not originally described as *savaram* in the zamindar's accounts were so designated in the accounts of subsequent years. But these variations were found by the District Judge to be easily explicable. The judgment of the Appellate Court shows clearly to our minds that the Judge did not fail to address himself to the real question between the parties, viz., whether the evidence was sufficient to establish that the zamindar was the owner of both the melvaram and the kudivaram in the lands. The discussion is not directed to the point whether the lands in this suit were proved to

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be *savaram* in ancient times or at the time of the permanent settlement. The Judge first shows that *savaram* lands were treated in the accounts of the estate as different from the *seri* or public cultivable lands, that they were held by the ryots on rates of rent different from the *seri* lands and that Government by collecting water-rates on *savaram* lands from the zamindar, while it levied it from the ryots in the case of *seri* lands, apparently treated the former as belonging to the zamindar. He then refers to evidence showing that from the year 1892 the zamindar asserted and the ryots admitted that the full proprietary right in the lands belonged to the former. He finds that in 1896 and 1897 the zamindar let these lands definitely as his own private lands and that in 1898 and subsequently he substituted grain rents for money rents and put up the lands for auction to the ryots who offered the highest bids of rent. These are points directly relating to the question whether the kudivaram right belongs to the zamindar or to the ryots and have no bearing on the identity of the lands with those belonging to the zamindar as *savaram* in olden times. In summing up his conclusions the Judge observes that the plaintiff has proved the lands to be private. We are therefore of opinion that the lower Appellate Court's incorrect interpretation of the word *savaram* does not affect the validity of the finding that the lands in question are the zamindar's private lands.

Another objection taken to the finding is that the pattas of the year 1897, in which the lands were let as the private lands of the zamindar, ought not to have been taken into consideration inasmuch as the leases evidenced by them were to operate from 1st July 1898, the beginning of the fasli year 1308. The argument is based on section 185 of the Estates Land Act which enacts that "when in any suit or proceeding it becomes necessary to decide whether any land is the landlord's private land, regard shall be had to local custom and to the question whether the land was before the 1st day of July 1898 specifically let as private land and to any other evidence that may be produced, but the land shall be presumed to be private land until the contrary is shown." We cannot accept this contention. The letting took place before 1st July 1898 although the period of the lease commenced only subsequently. It is the date of the contract that is material in deciding whether the evidence is admissible. The legislature wished to make all contracts made from and after the 1st July 1898 inadmissible

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against the ryot on the ground that proprietors had been making attempts to convert public lands into their own private lands for sometime before the Act was passed. Suppose a zamindar made a lease in 1895 for a period of three years and at same time gave a lease to another person to come into operation on the expiration of the previous lease, it would be impossible to hold that the letting to the second lessee was after the 1st July 1898. Such an interpretation is not required either by the words or the mischief of the statute, [*Nilmoni Chuckerbutti* v. *Bykant Nath Bera*(1)]. Mr. Govindaraghava Aiyar for the respondent asks us to hold that leases granted after 1st July 1898 are not shut out by the section and that it only provides affirmatively that leases prior to that date should be taken into account. This is hardly consistent with the object of the section nor is it easy to see why there should be any provision to making a letting before 1st July 1898 admissible if leases both before and after that date were regarded as equally admissible. The appellants also contend that subsequent dealings after 1st July 1899 ought not to have been taken into consideration by the Judge for any purpose. But he was certainly entitled to take them into account for deciding whether they had not been held as private lands by the zamindar for a period of twelve years prior to the commencement of the Act. Moreover it cannot be held that when a zamindar has proved that he let certain land as private land before 1st July 1898, subsequent letting of the land in the same character cannot be proved to show that it was treated in the same manner after July 1898 as in the letting previous to July 1898. The Act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is private land, and it cannot be held that all evidence subsequent to 1st July, 1898 is shut out altogether. (See *Akhju Singh* v *Jagannath Prasad Singh*(2).)

The third objection to the finding of the Appellate Court is that the Judge's opinion, that the *khats* of 1896 which contained a statement that the tenants had no occupancy right were not executed by the ryots without a knowledge of the contents of the documents, was based by him on his own personal knowledge and that he acted illegally in importing his own private knowledge in deciding the question whether the plaintiff's witnesses who stated

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that the ryots had a talk over the terms of the *khat* and raised no objection to them or the defendant's witnesses who denied all knowledge on the part of the ryots of the terms, should be believed. There is no doubt that a Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise. See *Hurpurshad* v. *Sheo Dyal*(1) and the cases cited in Ameer Ali and Woodroffe on Evidence at pages 115 and 806 (2). But at the same time it is quite clear that a Judge may use and cannot help using his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in dispute in the case. See Thayer's cases on Evidence, page 10, and Best on Evidence, page 176, section 187, where it is observed, "but here an important distinction must be borne in mind; viz, the difference between general information and particular personal knowledge." Wigmore in his treatise on Evidence says (see section 2570, Vol. IV) that "a juror is entitled to use his knowledge of the conditions affecting various kinds of values (of land)." The data on which legal inference is based are not all proved by evidence. Very often, though not always, what may be said to be of the nature of a major premise has not got to be proved. The Judge is entitled to act upon his own knowledge of the conditions of society including the history of its economical progress. It is not necessary to prove that population has increased and that there is great demand for land on the part of the cultivators now in parts of the country while in former times land was plentiful and cultivators were scarce. The dividing line is not easy to fix in all cases. What the Judge has done in this case is to use knowledge gained by him from his own experience that in 1896 there was no such scarcity of land for cultivation as to induce ryots to sign any muchilika that they might be required to execute. That is merely a fact of economical history. The Judge has not used his own knowledge as to the conduct either of the particular zamindar or of his ryots or the relations between them in any particular case or to fix the exact time at which any particular change commenced. He does not use his knowledge of the character of any particular individual which is necessarily of a variable kind (see 'Wigmore,' section 2570, Vol. IV). No doubt

(1) (1876) 3 I.A., 259 at p. 286.

(2) 5th Ed. (1911).

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the private knowledge used by the Judge related to lands in the Nuzvid zamindari. But that is really an extensive tract of territory and the Judge did not import into the judgment any knowledge of the village in question or even specifically relating to the Gannavaram estate in the Nuzvid zamindari. We do not think that the Judge overstepped the boundary line in this case. The onus was on the ryots to prove that they had no knowledge of the contents of the *khats* which they executed; and the Judge was entitled to disbelieve evidence of facts which *primâ facie* required strong proof. *Durga Prasad Singh* v. *Ram Doyal Chaudhuri*(1) does not really help Mr. Seshagiri Aiyar. There the Judge was using his knowledge of a fact of a specific character, viz., that landlords were deliberately inducing ignorant ryots to sign documents describing themselves as temporary lessees, Tilcadars or Ijaradars. The question whether pressure was used in that case undoubtedly required to be proved by evidence relating to the execution of the particular document. In *Hurpurshad* v. *Sheo Dyal*(2) the Privy Council merely held that a Judge cannot use his knowledge of the character of a particular witness in deciding as to his credibility.

The objections taken to the finding of the District Judge on the question whether the zamindar is entitled to both the varams in the lands must therefore be held to be untenable and the Second Appeals must be dismissed with costs.

SADASIVA AYYAR, J.—The facts of the case have been fully set out in the judgment just now delivered by my learned brother and I need not repeat them. As two of the questions involved in the case are of some importance, I think it is not inappropriate to add a judgment of my own. As regards the meaning of the word *savaram*, this word like *seri*, *jeroyati* and similar words seems to have different meanings in different parts of the country, but so far as this Presidency is concerned the opinion of Mr. Grant, Dr. Maclean, Baden-Powell and of Sir G. S. Forbes seems to be that the word *savaram* when applied to a land in a zamindari tract indicates usually that the land itself, both *melvaram* and *kudivaram*, belongs to the zamindar free from any obligation to pay revenue to Government on the extent of such land. I do not say that in consequence of a land being known as *savaram* it *should*

(1) (1911) I.L.R., 38 Calc., 153. (2) (1876) 3 I.A., 259 at pp. 285 and 286.

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be presumed to belong (both *melvaram* and *kudivaram*) to the zamindar, but I think that Courts *may* presume such land to be of the above character. The learned District Judge in this case seems to have put the presumption rather too strongly but otherwise his judgment which has gone very carefully into the evidence seems to be not open to criticism.

As regards the other important question as to how far a Judge could use his own knowledge when arriving at a conclusion on the evidence adduced before him, the authorities are by no means clear. In the case in *Hurpurshad* v. *Sheo Dyal*(1), the Judge in the lower Court imported into the case his own knowledge of the fact that the family of the parties had recognised the division which one Chandan had made prior to his demise though there was no evidence let in about such recognition by the family. Their Lordships of the Privy Council held that this ought not to be done as the Judge's knowledge *might have depended on mere rumour or hearsay.* Their Lordships in the next sentence in *Hurpurshad* v. *Sheo Dyal* (1) state "But even if the Commissioner's statement of facts from his own knowledge be taken as evidence"—this shows that their Lordships did not finally decide that if the Judge's knowledge *was not based upon mere rumour or hearsay*, but was the impression made directly on his own senses and if such knowledge had been communicated to the parties for criticism and comment, such knowledge could not be used by him in arriving at a conclusion on the evidence before him. In *Lakmidas Khushal* v. *Bhaiji Khushal*(2), a Subordinate Judge decided the suit after local inspection in which he found that a passage for rain-water *spoken to by the plaintiff's witnesses as existing did not really* exist. It was contended before the High Court that the Subordinate Judge acted illegally in importing his knowledge obtained at the local inspection in deciding the case and the appellant's vakil relied on the oft-quoted and as often misunderstood case of *Kessowji Issur* v. *G.I.P. Railway Company* (3). But one of the learned Judges (CHANDAVARKAR, J.) easily distinguished that case on the ground that all that the Privy Council decided was that the learned High Court Judge's personal knowledge obtained on an inspection of the locality on a different day amidst possibly different

(1) (1876) 3 I.A., 259 at pp. 285 and 286. (2) (1911) I.L.R., 35 Bom., 317.
(3) (1907) I.L.R., 31 Bom., 381.

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surroundings was no safe criterion in deciding the question in issue in that particular case. The learned Judge (CHANDAVARKAR, J.) in *Lakmidas Khushal* v. *Bhuji Khushal*(1) clearly held that the Subordinate Judge did not act illegally in using his knowledge of the non-existence of the rain-water-passage in deciding the case before him. In *Bourne* v. *Swan & Edgar, Limited* (2) FAREWELL, J. said that two classes of cases must be distinguished in these matters and while in one class of cases the Judge's direct knowledge can be used only for the purposes of enabling him to understand the questions that are being raised, to follow the evidence and to apply the evidence, there are cases of a different kind where it is the eyesight of the Judge that is practically the ultimate test. In cases of infringement of patent rights or infringement of trade-marks and in cases of "passing off" the defendant's goods as plaintiff's, the Judge has mostly to rely upon the evidence of his own senses. As regards the demeanour of witnesses, the Judge has to depend upon the knowledge and the impression brought to his mind by his eyes and ears. Even as regards the credibility of witnesses, let us suppose that a person known to the Judge as of the highest character is produced as a witness before the Judge. Is it possible for him to put out of his mind his knowledge of the character of the witness in coming to a conclusion upon the evidence? It is simply asking the Judge to perform an impossible feat. As to using the observations made by the Judge at a local inspection merely to understand the evidence, I shall here quote the remarks of BISSEL, J., in an American case. "We are very frank to say we do not appreciate the refined distinction which is drawn by some authorities wherein it is held that the jury are not at liberty to regard what they have seen as evidence in the case but must utterly reject it otherwise than as an aid to the understanding of the testimony offered The folly of it is apparent from the constitution of the human mind and the well-known processes by which juries arrive at conclusions. If a dozen witnesses should testify that there was no window on the north side of the house from which one had sworn that he had viewed the affray and the jurors on view should see the window, all lawyers would know that it would be futile on the argument to insist on the jury that their verdict must be based on the

(1) (1911) I.L.R., 35 Bom., 317. (2) (1903) 1 Ch. D., 225.

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non-existence of the window since the point had been sustained by a vast preponderance in the number of witnesses."(1) I know that there are old dicta to the effect that a Judge should decide only on the evidence before him and should not at all use his private knowledge. Wigmore refers (para 2569, note 2) to a case in Henry IV's time where the Judge allowed a prisoner to be convicted on the evidence but got a pardon for him from the King because the Judge knew of his personal knowledge that the accused was not guilty. This shows the absurd lengths to which the doctrine of not using personal knowledge in coming to a conclusion in the case could be carried and why it is that there is some agitation now in this country for village panchayats to be constituted as Judges so that they might use their own knowledge of the facts of the case and the character of witnesses to come to conclusions on facts. I do not of course wish to restore the days of Mariada Raman or Haroun-al-raschid but a Judge must be allowed to use even his knowledge of concrete private facts, provided he mentions his knowledge to the parties and they do not object to his deciding the case and he must be allowed of course to use his knowledge of general or public facts, historical, scientific, political and otherwise in coming to his conclusions. Let us take the case of a witness who belongs to a hill tribe which is known to the Judge by his past experience as a Revenue Officer as consisting of persons who are generally incapable of telling complicated lies, is not the Judge entitled to use his said knowledge in arriving at a conclusion on the evidence of that witness? Judges and juries do use and, it seems to me, are entitled to use their general past experience of men and things in arriving at conclusions of fact and such experience is not only not considered as a disqualification but is a very necessary qualification for coming to sound conclusions of fact. I know that English Judges have laid down in some cases the rule as to the using of the Judge's own knowledge in coming to conclusions upon the evidence rather too strictly; see *London General Omnibus Company Ltd.* v. *Lavell*(2) but with great respect, I am inclined to think that the only restriction which can be imposed upon the Judge is that he should not import knowledge obtained by mere rumour

(1) 11 Colo. App., 41. (2) (1901) 1 Ch. D., 135.

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or hearsay of concrete facts connected with that particular case before him for arriving at a conclusion. When a Judge is supposed to be reliable enough to come to a conclusion on the evidence of facts deposed to before him as seen or heard by witnesses, it is surely anomalous and even startling to hold that he cannot be relied on to use impartially the facts directly seen and heard by himself. The only result of thus holding would be that Judges would be induced to take some formal evidence of the same facts from much less reliable sources than themselves and to omit all mention of their own knowledge in their judgments and this course cannot be held as conducive to a satisfactory decision of the cases when they come up on appeal before the Appellate Court.

When a proposition of fact has to be established before a judicial tribunal, there are two principal heads under which the modes of presentation of the evidentiary facts fall. "The first is by the presentation of the thing itself as to which persuasion is desired" (Wigmore section 24) and this mode is called Immediate or direct real evidence (*Pratyaksha Pramana*). In cases of contempt of Court, committed in the presence of a tribunal "it has direct real evidence of the fact" "The thing which is the source of the evidence is present to the senses of the tribunal" This first and best mode of proof (called *Pratyaksha* in Sanskrit) is sometimes rather pedantically called "Autoptic proference" in English. When a Judge sees the demeanour of a witness or observes that a witness is blind or deaf or a prosecutrix who complains of rape is a brazen muscular woman or that an accused charged with running away from custody is a lame man it is surely open to him to use such direct knowledge in coming to his conclusions as to the rights and wrongs of the parties before him without having these facts proved by the statements of others as witnesses The second principal head of proof (Inference or *Anumanam*) falls under two sub-heads viz., (*a*) the evidence given by a human being heard or read by the tribunal and called testimonial or direct evidence and (*b*) other connected facts called circumstantial or indirect evidence (see Starkie 1-13).

When a tribunal knows a fact by direct real evidence, that fact is necessarily established much more satisfactorily than by the other kinds of evidence. It may be necessary to provide that when a fact is known to the Judge in this way, he should make a note of

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it in writing during the course of the trial and read it out to the parties so that the parties might be aware that the Court has knowledge of that fact and so that arguments and comments might be based and explanations offered by both sides on such fact so stated by the Judge as known to him before the Judge decides on the rights and liabilities of the parties. This is the principle of the rule enunciated in some Indian cases, that the Judge who has made a local inspection should place on record the evidence and impressions gathered by him (see *Raikishori Ghose* v. *Kumudini Kant Ghose*(1). In England and America juries are mostly the Judges of fact and the jury are presumed not to be able to arrive at proper conclusions without a pretty exhaustive summing up of the evidence by the Judge. Further, if one of the jurors has previous private knowledge of a fact, the others might not know it. Hence there is the rule that that juror must testify as a witness in the case though his said private knowledge and his having testified as a witness do not make him incompetent to sit on the jury as one of the Judges of facts, as his knowledge after he gives his evidence is commented upon by the Judge in his summing up. The system of trial by juries who are returned " of the Vicinage whence the cause of action ariseth " was originally based on the circumstance that " the law supposeth them hence to have sufficient knowledge to try the matter in issue though no evidence were given on either side in Court." If such evidence of witnesses is given, the jury " may have evidence from their own personal knowledge by which they may be assured and sometimes are that what is deposed in Court is absolutely false " and " the jury may know the witnesses to be stigmatized and infamous " (VAUGHAN, C.J. in Bushell's case 1670). But between 1650 and 1700 " the necessity of controlling the jury in some further way under the changed " and changing conditions of society was felt and hence, the Judges who were guided by such motives gradually laid down a new rule. From 1702 the new rule has been established that a juror should give evidence and be subjected to the test of cross-examination before he could use the facts in his own direct knowledge and communicate them to his fellow-jurors, if those facts are not " notorious ". or " unquestioned " facts or facts deducible from the common fund of experience and knowledge of which any body could

(1) (1912) 15 C.L.J., 138.

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reasonably take 'notice' without proof and are not "matters of mere private interest."

If a Judge has knowledge of some particular concrete fact which is a matter of mere 'private interest' peculiar to the particular case before him which fact is not an existing natural fact (of relative permanence like the existence of a stream or a tree) but one that has already happened and which fact is a matter of strong controversy between the parties, he should no doubt retire from the case as Judge so as to be able to give his evidence for one side or the other before another Judge. But where a Judge has no personal or pecuniary interest in a case and merely uses his knowledge of human nature or his general opinion of large classes of people based on his previous experience or the testimony of his own senses in respect of things and persons observed by him in the course of the proceedings before him after he had given notice to the parties (or even outside the proceedings, provided he mentions such knowledge to the parties), I do not see how he could be prevented (except by asking him to do the impossible feat of forgetting everything and even not to be led sub-consciously by facts within his knowledge) from using such knowledge I cannot even bring myself to understand why he should be so prevented, especially if he has special technical learning, knowledge and general information which gives him very useful materials for arriving at a proper conclusion. A Judge is appointed presumably for the reason that his learning, impartiality and trained powers of observation are superior to and more reliable than the average learning, etc., of the litigants and witnesses before him. In systems of law where the Judge has very little to do with findings on facts, a Judge might be made merely to sum up the evidence before him impartially (without asking the jury to consider what he knows) and leave it to the jury to come to their own conclusions. But where (as in India in all civil cases and most criminal cases) the Judge is a Judge of both facts and law, it is impossible to ask him not to use his knowledge of particular classes of people, and other like circumstances when arriving at a conclusion on facts. Of course if an Appellate Court finds that a lower Court has unduly pressed such general knowledge (say, by unduly suspecting the genuineness of an unregistered document because it was executed in a town notorious for forgeries or because the writer was of a particular caste or profession), the appellate tribunal would use its

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own presumably sounder knowledge of human nature to set right the inferior Court and give advice to the lower Court not to be led too much away by such considerations. It has been sometimes laid down that a Judge must as Judge "ignore what he knows as a private man" and he "may have to ignore" as a private man what he knows as Judge. I respectfully dissent from such observations. In some old cases (collected in foot-note 4 in Wigmore, para. 2569), it was held that the Judge's personal knowledge of a witness's lack of credit should not be used. In a latter case however the trial Judge's "great familiarity with that portion of the state" was considered as a ground for not reversing his judgment and a Judge's personal knowledge of the services of a counsel (obtained as Judge sitting in the previous case) was allowed to be used by the Judge in fixing the remuneration of that counsel in an action brought by the counsel for such services. I think the only practical rule which can be laid down in these cases is that if a Judge knows of his own knowledge as an individual observer of a past relevant concrete private incident and that fact cannot be subjected to ocular proof at the time of trial (such as a person's colour, resemblance of features, appearance, behaviour, chemical experiments on the present condition of the object) and if the truth of such incident is contested between the parties, he should mention his private knowledge of such incident to the parties and he should refuse to be the Judge in that case, unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge. That the Judge was competent to give evidence in the witness-box and to subject himself to cross-examination and then to decide the case was the old rule but this has been discountenanced for obvious reasons in modern times and, in my opinion, should not be allowed. All that can be permitted is that the Judge's personal knowledge should (as in cases of proceedings for contempt) be recorded and be allowed to be commented upon in a moderate manner. In the case of concrete particular facts, the Judge who uses his own knowledge should only be obliged to state whether he knows it by direct knowledge or by rumour or hear-say and should not be subjected to cross-examination. General knowledge of the tenures in a particular area or of the character of certain populations as also direct knowledge gained by his own senses and mind—it is impossible to prohibit the Judge from

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using such knowledge in drawing inferences from the evidence before him and in coming to conclusions as to the rights of parties before him. In the present case, the learned Judge has not gone further than to use the general knowledge which he had acquired as a past revenue officer and as a revenue Court of experience in the course of the performance of his duties in zamindari tracts; and I hold that he was entitled to use such knowledge in coming to a conclusion on the facts after the consideration of the evidence let in in this case. One other short point has to be noticed, viz., whether evidence as to leases granted after 1st July 1898 are wholly shut out as evidence by section 185 of the Estates Land Act. I am inclined to hold that they are so shut out if sought to be used for the purpose of proving the character of the tenure of the land and even if such leases are sought to be proved merely in order to show that land was treated in the same manner after July 1898 as before July 1878. I agree, however, with my learned brother that leases granted before 1st July 1898, though they were to come into force only after 1st July 1898, are admissible in evidence and in the result, I agree that these Second Appeals should be dismissed with costs.

PRIVY COUNCIL.

JOOPOODY SARAYYA AND OTHERS (PLAINTIFFS),

v.

LAKSHMANASWAMY (DEFENDANT).

P.C.* 1913 Feby. 26, 27, March 19

[On appeal from the High Court of Judicature at Madras.]

Limitation Act (XV of 1877) Schedule II, article 106—Suit for partnership account—Presumption of dissolution of partnership from facts of case—Cessation of annual accounts rendered yearly for many years and rendering of final account showing division of capital and revenue.

The question in this appeal which arose out of a suit brought in 1902 for a partnership account and to recover the plaintiffs' share in the properties of a business carried on by them and the defendants, was whether the suit was barred by limitation, the defendants contending that there had been a dissolution of the partnership in 1891 which the plaintiffs denied.

Held (affirming the decision of the High Court) that when annual accounts of the partnership business which had been rendered year by year from 1868 to 1891, ceased in the latter year and on 12th April 1891, a final account showing

* Present — Lord ATKINSON, Lord SHAW, Lord MOULTON, Sir JOHN EDGE and Mr. AMEER ALI.

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the division of both capital and revenue was made out, the defendants afterwards carrying on the business without any interference from the plaintiffs, the presumption was in favour of the dissolution of the partnership as at the definite date of the year when the account was thus closed. And their Lordships were of opinion that these facts taken with the other acts and conduct of the parties, and the whole circumstances of the case which greatly strengthened the presumption, made the inference in favour of the dissolution having occurred at the above date substantially conclusive. The suit, therefore, not having been brought within three years from that date was barred by article 106 of schedule II of the Limitation Act (XV of 1877)

APPEAL from a judgment and decree (10th December 1908) of the High Court at Madras, which reversed a judgment and decree (16th September 1905) of the Subordinate Judge of Rajahmundry.

The only question for decision on this appeal was whether the appellants were entitled to an account of a partnership business carried on at Akuvidu, and to recover their share of the assets and properties thereof, or whether their claim was barred by limitation.

The plaintiffs' (appellants') case was that they and the first defendant, one Ramamurthi, were members of a Hindu joint family, owning and possessing joint properties. They carried on a business at Kottapally of which they were the sole proprietors; and they also carried on a business at Akuvidu in partnership with the second defendant, one Venkanna, in which the joint family had a one-half share, and Venkanna the other half share. The joint family business at Kottapally was managed and financed solely by members of the joint family, the business at Akuvidu was to a large extent financed by the joint family, but was managed by Venkanna as the working partner. That business commenced about 1868, and mutual transactions took place between the business at Akuvidu and that at Kottapally. The accounts of the Akuvidu business were settled and adjusted periodically, and a balance was struck in the books of account showing the sum due to the joint family. The last of such adjustments took place on 12th April 1891 (Exhibit A12) and the sum of Rs. 53,765-14-6 was debited in the books of account as representing the share capital of the Kottapally branch of the business. Various properties were from time to time acquired out of the funds of the business by Venkanna for and on behalf of the partnership, which were managed by him thereafter and formed part of the assets of the partnership business.

In 1890-1891 differences arose amongst the members of the Kottapally branch, and they were desirous of effecting a partition

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of the joint properties belonging to them including the Kottapally business. On 20th June 1890 the appellants and Subanna, the father of the first defendant, appointed by deed one Venkatrazu as arbitrator to effect the partition, and a partition was eventually made by him in 1891 of the Kottapally properties amongst the members of the joint family, with the exception of some of those properties and the half share of the Akuvidu properties and business which remained undivided: and after that partition the Kottapally business was closed. Throughout the partition proceedings, Venkanna, though fully aware of them, never made any demand or claim for a share of the Kottapally properties or business, nor suggested that any share should upon the partition be set apart for him. He contributed no capital to the Kottapally business, was not consulted about it and did no work for it; he never made any adjustment or settlement of accounts in connection with it in the books of the Kottapally business, and had no right of any sort in it.

The partnership business at Akuvidu was from and after the last adjustment in April 1891, and the partition abovementioned, continued as before under the management of Venkanna, and the appellants, Subanna, and the first defendant were kept informed of and consulted from time to time by him as to its affairs.

It was also alleged that certain of the land mentioned in the plaint was subject to a usufructuary mortgage in favour of the appellants' joint family, the mortgage deed being in the name of Subanna. The annual income therefrom was collected on behalf of the Kottapally branch by Venkanna and was utilised by him in the Akuvidu branch up to 1900-1901 when the mortgage came to an end These amounts were in the Akuvidu books of account credited to Subanna, and in the Kottapally books up to 1891 were debited to Venkanna. A decree had been obtained by Subanna in the Court of the Munsif of Ellore for money due to the Kottapally business; and after the death of Subanna the first defendant was substituted on the record as decree-holder. Venkanna up to 1903 executed that decree, realised the decretal money, used it for the purpose of the Akuvidu business, and credited it in the books of account of the business.

On various occasions from and after 1891, namely (*inter alia*) in 1893, 1895 and 1901, the appellants endeavoured to have the

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Akuvidu properties divided and the business wound up and closed, but without success; and on 19th December 1902 the appellants instituted the suit out of which the present appeal arose against the first defendant Ramamurthi, Venkanna (since deceased) and Lakshmanaswamy the second respondent, his adopted son, now sole respondent.

The plaint prayed as against Venkanna and Lakshmanaswamy that the Akuvidu partnership should be dissolved and wound up, that an account should be taken of its dealings and assets, including an enquiry as to the properties purchased out of the funds thereof, that the half share of the Kottapally branch should be ascertained, and that three shares thereof should be made over to the plaintiffs with costs, and for further and other relief.

As against the first defendant there was a prayer that the properties of the plaintiffs and himself still remaining joint and undivided should be partitioned, but that claim was compromised.

Venkanna and Lakshmanaswamy in their written statements (so far as is now material) alleged that thirty years previously an agreement had been come to between the Kottapally branch on the one side and Venkanna on the other, whereby each party was to have a half share in the two businesses: and that in 1890 or thereabouts an arrangement was come to between the two parties whereby the Kottapally branch were to take as their share of the two businesses the Kottapally business, and that Venkanna was to have as his share the Akuvidu business; that since then Venkanna had been enjoying the property of the latter business separately; that the Akuvidu partnership ceased at that time (1891) and that the suit was therefore barred by limitation

The Subordinate Judge held that Venkanna had no interest in the Kottapally properties and business, and that the Kottapally branch of the family had owned a half share of the Akuvidu business and properties; that there was no arrangement in 1890 or 1891 that the Kottapally branch were to take the Kottapally properties and business, and that Venkanna was to take the Akuvidu business and properties; that Venkanna had produced no accounts of the Akuvidu business prior to 1891 although

he admitted that he had them; that the plaintiffs continued to possess their interest in the Akuvidu business and properties, and that subsequently to 1891 there had been various attempts made by them to obtain a division of those properties; that no question of limitation therefore arose, and that the plaintiffs were entitled to a share in the Akuvidu business.

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The Subordinate Judge made a decree for dissolution of the partnership, and for accounts to be taken.

The defendants Venkanna and Lakshmanaswamy appealed to the High Court against the decree of the Subordinate Judge and the appeal was heard by SANKARAN NAIR and PINHEY, JJ., who reversed the decision of the Subordinate Judge and dismissed the suit as barred by limitation SANKARAN NAIR, J., said after stating the facts —

"On the facts stated above it must be found that the partnership was dissolved in 1891. The partnership is not one for any period of time It was a partnership at will It might be dissolved at any time by any one of the parties. Exhibit A 12 was prepared with a view to divide the properties at Akuvidu. There was no intention, it is clear, at that time of the plaintiffs carrying on the Akuvidu business as before" And after dicussing the evidence at some length his judgment on this point concluded as follows. —"We are therefore of opinion that the partnership must be treated as having been put an end to in 1891, that the plaintiffs were not treated as partners subsequent to that date, and therefore their claim to recover the amount due to them is barred by limitation." And in that decision PINHEY, J., concurred.

On this appeal,

A. M. Dunne, for the appellants, contended that the Akuvidu partnership business had not, in fact, been dissolved by agreement as alleged, or in any way that was definitely proved. The arrangement alleged by the defendants by which Venkanna was said to have taken the Akuvidu business and the appellants' joint family the Kottapally business was found by the Subordinate Judge not to have been proved That finding had not been traversed on appeal to the High Court, but the case there set up and argued was that the suit was barred by limitation because the conduct of the parties showed that the appellants had not been treated as partners in the Akuvidu business and that the partner-

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ship must therefore be taken to have been dissolved in 1891. There was, however, nothing in the Limitation Act or elsewhere which prevented a partner [until he had been declared to be not a partner] from bringing a suit for an account against his co-partners: no limitation, it was submitted, could run against him unless the partnership has been definitely dissolved. But what definite act of the parties or any of them had caused a dissolution of the partnership? The decision of the High Court amounted merely to an inference or presumption from certain circumstances that it had been dissolved in 1891; but that it was contended was not sufficient. The partnership was admitted, and it presumably continued until put an end to by some definite act. There was no such act proved, nor was any precise date shown when it became dissolved, and the appellants were justified in presuming that their interest and rights therein had never ceased or been put an end to. No case of estoppel by conduct had been established against the appellants. On the contrary they were after 1891 continually pressing the defendants in order to obtain a division of the Akuvidu properties, and get the business wound up, particularly in 1893, 1895 and 1901, as had been held by the Subordinate Judge.

Dr. Gruyther, K. C. and Kenworthy Brown, for the respondent, asked by their Lordships to go into the evidence of the acts and conduct of the parties to show whether from them an inference could be drawn that there was really no partnership existing in the Akuvidu business after April 1891, pointed out the nature of the accounts rendered by Venkanna to the appellants' joint family prior to 1891, and up to the alleged adjustment of that year, and the fact that after that adjustment no such accounts were continued as had been previously rendered, and contended that the account rendered on 12th April 1891 contemplated a division of the Akuvidu properties with a view to dissolution, [LORD MOULTON.—Division of the assets is practically notice of dissolution] and that after that date the appellants were not treated as co-partners; that their division of the Kottapally properties and business among themselves lent some probability to the existence of the alleged arrangement that that business should belong to the appellants, and the Akuvidu business to the defendants, and estopped the appellants from claiming any interest in the latter business; that their

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view was confirmed by the letter of the 3rd May 1901 ; and that from what occurred in 1891 there must have been a termination of the partnership, and the High Court was right in so presuming. There were concurrent findings as to the fact of the dissolution of the partnership in 1891, the Subordinate Judge finding that "Exhibit A was kept from 1868 when the business was started, and continued to 12th April 1891, when the business ceased to exist as a joint business at Akuvidu", and "the adjustment of account in Exhibit A 12 was made with a view to division." And the High Court had made concurrent findings(1).

Dunne replied.

The judgment of their Lordships was delivered by

Lord SHAW.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 10th December 1908, which reversed a judgment of the Subordinate Judge of Rajahmundry, dated the 16th September 1905 The suit as brought included a claim for partition of certain family property. That part of the suit has been settled What remains constitutes the subject of the present appeal. The assertion is that the plaintiffs' family has a half share, along with the defendant (the present respondent) in a partnership business carried on in Akuvidu The High Court has held that this claim is barred by limitation and has dismissed the suit.

It is unnecessary to refer to various other pleas in the case, including those founded on an alleged misjoinder of causes of action, because, in the opinion of their Lordships, the conclusion reached by the High Court on the plea of limitation was clearly correct.

In or about the year 1868 a partnership business was started in Kottapally. At a later date a business was started at Akuvidu. This latter was throughout under the management of one Venkanna, the adoptive father of the respondent. The position of Venkanna (who was the second defendant in the suit) was this he maintained that in both businesses he had a half share, that in, or shortly before, the year 1891, an arrangement was made under which the joint family represented by the appellants made a partition of their family property ; and it cannot be denied that,

(1) See extracts from High Court judgment ante p 1‑9

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with regard to the Kottapally business, this partition became an accomplished fact. Venkanna, however, further maintained that there were cross-claims; that he was entitled to a certain share of the assets of the Kottapally business; that, on the other hand, the joint family was entitled to a certain share in the Akuvidu business; that these claims were set against each other, and that from 1891 the joint family has had no share in the Akuvidu business.

It has to be admitted that, if a partition has taken place of the joint family property, it is at least not unlikely that that would have extended to all the businesses which the joint family shared; and it must further be conceded that, if the joint family's interests were divided, a dissolution of the Akuvidu partnership with Venkanna was naturally incident to the situation thus created. Different *personæ* had arisen in law, and with these it was open to Venkanna to say whether he should be allied in partnership or not. What Venkanna does say is, that the dissolution —thus not unnatural in the situation of the joint family affairs in 1891—did in fact take place. If this is so, the suit, which was initiated eleven years after that event, is, of course, barred by the three years' limitation established by article 106 of schedule II of the Limitation Act.

In the opinion of their Lordships, the High Court has come to a correct conclusion, and it is quite unnecessary to enter upon the details of the case, which, in the view taken by the Court, amply confirm the result which has been reached.

Four salient points may simply be noted: (1) Prior to 1891, and year after year, detailed accounts, suitable as those of a current partnership business, were rendered as between the joint family, on the one hand, and Venkanna on the other. After that year these accounts entirely ceased. But (2) in the year 1891 an account was furnished of a different character. That account, in their Lordships' opinion, was to all intents and purposes not a revenue but a capital account, showing a complete division of the partnership shares. It was, in short, in form and in substance an account entirely suited to the event and purposes of a dissolution of partnership. (3) From that time forward Venkanna managed the Akuvidu business without any interposition or interference by the joint family or any representative thereof in their interest. It is true that certain requests were made to Venkanna for pay-

ment, but these were requests, not for a share of profit, but for the payment of the balance due upon the dissolution account. Finally (4) Venkanna having been apparently throughout maintaining that his liabilities under the Akuvidu business were balanced by his share of the assets in the Kottapally business, the dispute was arranged by a letter of the 3rd May 1901, the authenticity and importance of which is not denied. It was written to Venkanna by the first three plaintiffs and by Lakshmanaswamy, who is called as the first defendant. In fact, it is the letter of the members of the joint family; and in this letter, signed by them, they admit to Venkanna "you are singly carrying on business," and they refer to the "verbal arrangement before this among ourselves that the property acquired by you by carrying on business at Akuvidu, and the property acquired by us by carrying on business at Kottapally, should be duly divided and taken according to shares." They then narrate their unanimous request for a settlement, and agree to take from Venkanna a sum according to his wishes Serious questions might be raised as to whether the writers of such a letter were not barred from thereafter instituting the present suit, but for the purpose of the point of this decision it is sufficient to say that it completely confirms the idea of a *dissolution of partnership having been effected* at a *previous* date, and it squares with the events on that footing which took place in the year 1891.

Mr. Dunne presented a careful argument, in which he strongly insisted that, as the Akuvidu partnership was one at will, it must be presumed to last till now, unless a definite date of dissolution could be put forward and *made out. But, in their Lordships'* opinion, this has been done, and in a substantially conclusive manner. When annual accounts ceased, and a final account, showing the division of both capital and revenue was made out, the presumption was for dissolution as at the definite date of the year in account thus closed. The cessation of the annual accounts points *to some radical change having taken place, and the other* circumstances above noted leave little doubt upon the mind that that change was the dissolution of the firm as in the year mentioned

All other questions in the case are thus at an end. Their Lordships will humbly advise His Majesty that the appeal should

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be dismissed and the judgment of the High Court affirmed. The appellants will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: *Sanderson, Adkin, Lee* and *Eddis.*

Solicitor for the respondent: *Douglas Grant.*

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. September 13 and 20.

MOITHEENSA ROWTHAN AND SEVEN OTHERS (PLAINTIFFS NOS 1 AND 3 AND THE LEGAL REPRESENTATIVES OF THE DECEASED SECOND PLAINTIFF), APPELLANTS,

v.

APSA BIVI (DEFENDANT No. 3), RESPONDENT.*

Court sale—Stranger purchaser, bonâ fide *effecting improvements—Subsequent eviction—Improvements right to value of.*

A purchaser in a Court auction, who was not a party to the decree, is entitled to the value of the improvements *bonâ fide* effected by him, on being evicted from the property owing to some defect or irregularity in the proceedings leading up to the sale. The time of his making the improvements is immaterial, provided he had then an honest belief in the validity of his title. *Bonâ fides* in this connection means only honest belief in the validity of his title and does not extend to the necessity of making proper enquiries as to the title and regularity of the prior proceedings. Section 51 of the Transfer of Property Act is inapplicable to a purchaser at a court sale.

Per curiam. There is a great distinction between stranger purchasers and decree holder purchasers. The principle of *caveat emptor* has no application to a court purchase.

There is no covenant for title implied in a court sale and the purchaser take only the right, title and interest of the judgment-debtor.

Quære: Whether *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1888) I.L.R., 10 All., 166 (P.C.) lays down that stranger purchasers in order to be entitled to protection should make their purchases *bonâ fide*?

Nanjappa Gounden v. *Peruma Gounden* (1909), I.L.R., 32 Mad., 530, *Kundarpa Nath Ghose* v. *Jogendra Nath Bose* (1910), 12 C., L.J., 301, *Stock* v. *Starr* (1870) 1 Sawyer, 15, s.c. 22, (India) Fed. cases, 1054, and *Bright* v. *Boyd* (1841-1843) 1 Story 478 and *Dharma Das Kundu* v. *Amulyadhan Kundu* (1906) and I.L.R., 33 at c. 1119, followed.

XXIV American Cyclopædia of Law and Procedure, page 70, referred to.

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* Second Appeal No. 305 of 1910

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SECOND APPEAL against the decree of J G. BURN, the acting District Judge of Tanjore, in Appeal Suit No 80 of 1909 presented against the decree of P. VENKATARAIYER, the District Munsif of Tiruvalur, in Original Suit No. 248 of 1907.

The facts of this case are set out in the judgment.

T. R Ramachandra Ayyar and *G S. Ramachandra Ayyar* for appellant.

The Hon. Mr. *T V Seshagiri Ayyar* and *T Natesa Ayyar* for respondent.

JUDGMENT.—In the suit which gave rise to this Second Appeal the plaintiffs claimed to recover from the defendants Rs. 800 as compensation for improvements made by them while they were in possession, as auction purchasers, of a house from which they were subsequently ejected by the defendants. The house belonged to one Johnsa Levvai and one Ramachandra Sastrial. These two persons mortgaged the house to one Samboo Ammal the fourth defendant, in the suit The latter instituted a suit on the mortgage to which the defendants Nos 1 to 3 in this suit were made parties as heirs of Johnsa Levvai, defendants Nos. 1 and 2 being his widows and the third defendant, his daughter. A decree was obtained on the mortgage and the properties brought to sale. The plaintiffs became the purchasers at the sale and obtained possession of the house on the 7th August, 1903. The third defendant was a minor while the suit was going on and represented by her uncle as guardian *ad litem*. Notice of the execution proceedings was issued to him. The process-server could not find him as he had left for one of the islands beyond India. The process-server's return stated that the third defendant said that she had attained majority and was competent to accept service herself and received a copy of the notice. The process-server in addition affixed the notice to the outer door of the house where the guardian *ad litem* used to reside, in token of serving it on him. The executing court apparently considered this service sufficient, for it proceeded to sale without taking any further steps to serve a notice on the guardian. After the plaintiffs had been in possession for about fifteen months, the third defendant's guardian *ad litem* put in an application on her behalf to set aside the sale on the ground of fraud His application was dismissed by the District Munsif's Court and by the District Court on appeal. But on Second Appeal the High Co

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set aside the sale on the ground that the third defendant had not been properly represented in the sale proceedings as her guardian *ad litem* had not been properly served with notice. The third defendant subsequently obtained an order for redelivery of the properties.

The questions raised in the issues, so far as they are relevant to this Second Appeal, were whether the plaintiffs as purchasers in court auction could claim the value of the improvements made by them; and whether, if they could do so at all, they were entitled to succeed in the circumstances of this case, that is, whether they made the improvements *bonâ fide* and without notice of the circumstances invalidating the sale. With regard to the nature of the improvements made, the District Munsif's finding goes to show that they were necessary and urgent repairs required to make the house habitable. The District Munsi found that the plaintiffs were not guilty of any fraud and that they made the improvements before the guardian *ad litem* took steps to set aside the sale. He considered the plaintiffs entitled to recover the value of the improvements made by them and awarded them Rs 512-1-6, making the amount recoverable by sale of the property in case of non-payment

On appeal the District Judge held that the improvements were made after the third defendant's guardian's application was put in and the plaintiffs had thereby been put on enquiry as to their position He held also that the sale was held without jurisdiction on account of non-service of notice on the third defendant's guardian *ad litem* and was void He was of opinion that the principle of section 51 of the Transfer of Property Act *could not be applied to an auction-purchaser to whom the* principle of *caveat emptor* would be applicable. In the result, he reversed the decree of the District Munsif and dismissed the plaintiff's suit. The plaintiffs have preferred this Second Appeal to this court.

Mr. *T. R. Ramachandra Ayyar,* the learned vakil, for the first appellant, contends (1) that the finding of the lower Appellate Court as to the time when the improvements were made does not show that the plaintiffs did not act in good faith in making the repairs and improvements and that it was sufficient that they acted honestly in the belief that the proceedings prior to the sale to which they themselves were no parties were conducted by the

court regularly and properly, (2) that the principle of *caveat emptor* has no bearing on the question of a purchaser's right to recover compensation for improvements made by him before the sale is set aside He also impeached the finding of the District Judge as one not based on a proper consideration of the whole of the evidence on record.

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For the respondent it is argued that, as the rule of *caveat emptor* applies to an auction purchaser, he must be taken to buy with all risks, whether arising from irregularity in the conduct of the sale or defect of title in the judgment-debtor or otherwise, and that he could not, under any circumstances, claim any compensation for improvements made by him; and secondly, that in any case it was the duty of the plaintiffs to make enquiries regarding the regularity of the sale proceedings when the sale was questioned by the guardian and that as the improvements were found by the District Judge to have been made after the inception of the proceedings to set aside the sale, the plaintiffs could not sustain their claim in this case.

We are bound to accept in Second Appeal the finding of the District Judge that the plaintiffs had notice of the application to set aside the sale before they made the improvements and we must deal with the case on that footing. The question of an auction purchaser's right to improvements made by him while in possession as such purchaser and the circumstances under which he would be entitled, if at all, to compensation, is one of considerable importance. No authority, either Indian or English, has been cited to us, nor are we aware of any directly deciding the question. The principle of *caveat emptor* has, in our opinion, no application to this case. It is no doubt well settled that there is no covenant for title implied in a court sale. But this means nothing more than that the auction purchaser takes only the interest in the property sold, which his judgment-debtor had in law at the time of the sale. The scope of the doctrine does not extend to the consequences of defects or irregularities in the proceedings leading up to the sale, which might render it void or voidable.

Section 51 of the Transfer of Property Act, it need hardly be said, is also inapplicable to a purchaser at a court sale The rights of auction purchasers in execution sales held by courts are favoured by the law in the interests both of the judgment-

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proper enquiry. In the former case MOOKERJEE and TENNON, JJ., held as follows:—"As a general rule, in order to entitle an occupant of land to compensation for improvements, three things must concur. . . . thirdly, he must have acted in good faith, that is, under the honest belief that he has secured good title to the property in question, and is the rightful owner thereof; and for this belief, there must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it. *Stock* v. *Starr*(1). These principles are substantially recognized in section 51, of Transfer of Property Act, and are based on obvious grounds of justice, equity and good conscience. In re *Thakur Chunder Paramanick*(2). The principle is, as Mr. Justice STORY put it in his classical judgment in *Bright* v. *Boyd*(3) which has been followed by this Court in *Dharma Das Kundu* v. *Amulyadhan Kundu*(4) that no man should be allowed to enrich himself unjustly at the expense of another, and that consequently where the defendant has made the improvements in good faith as a *bonâ fide* occupant of the land, and in the belief that the land is his own, the plaintiff who obtains the benefit of expenditure which has increased the value of the property, ought to reimburse the defendant for the expenditure so made." The learned Judges observe later on "No doubt, ordinarily, the privileges of a holder of property in good faith, cease when he has knowledge or notice of an existing title adverse to that under which he claims, but in the present case, that principle is inapplicable, because there was a substantial question in controversy as to the true effect of a testamentary instrument of an ambiguous character, and the occupant ought not to be held disentitled to compensation for improvements, unless they have been made after an adverse decision against him." It will be observed that the claimant of compensation did not derive his title in that case through any act of a Court. The position of one who does so ought, in our opinion, to stand on a superior footing. In the Madras case—*Nanjappa Gounden* v. *Peruma Gounden*(5)—, MUNRO and ABDUR RAHIM, JJ., laid down the same rule. They say "We are not prepared to say that good faith within the meaning of section 51 of the Transfer of Property Act, is necessarily precluded by facts showing negligence in

(1) (1870) 1 Sawyer 15, 22; s c (Indis) Fed. Cases, 1084.
(2) (1886) Beng. L R., 595 (F.B.).
(3) (1841-1843) 1 Story 478.
(4) (1906) I.L.R., 33 Calc. 1119.
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and most persuasive equity, as well as common sense and common justice for its foundation.

The principle enunciated by Justice STORY and adopted in the American Courts commends itself to us as eminently reasonable and we adopt it. The writer of the article on "Judicial Sales" in the American Cyclopædia of Law and Procedure, volume 24, page 70, states the law thus :—"It is generally held that when the proceedings are invalid, so that the purchaser loses the land, title to which he would have had but for the defects in the proceedings, he is entitled to recover back the purchase money paid by him, and to be reimbursed for money expended by him for taxes and on repairs and improvements that have increased the value of the land." It will be noticed that good faith is not said to be required in the passage though the succeeding statement relating to the purchaser's right to subrogation seems to require good faith in the purchaser to entitle him to the amount of liens on the property discharged by him. See also Moyle's 'Institutes of Justinian,' page 209.

We feel satisfied at any rate that the good faith required does not go beyond an honest belief in the purchaser in the validity of his title. The District Judge does not find that the purchaser was wanting in good faith in this sense, but he applied a wrong test by holding that the purchaser was bound to make due enquiries regarding the regularity of the proceedings. The third defendant did not show or even allege in her written statement that the plaintiffs were aware of the fact that notice of the execution proceedings was not served on the guardian *ad litem.*

We hold, for the reasons mentioned above, that the plaintiffs were entitled to recover compensation for the improvements made by them. With regard to the value of the improvements the District Judge concurs with the finding of the District Munsif.

The decree of the District Judge must therefore be reversed and that of the District Munsif restored with costs both here and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

MARADEVI AND THIRTEEN OTHERS (PLAINTIFFS NOS. 1 TO 10 AND NOS. 12 TO 15), APPELLANTS, — 1911. November 29, 30. December 14.

v.

PAMMAKKA (DEFENDANT), RESPONDENT.*

Aliyasantana law—Separate maintenance, grounds for—What are proper grounds ?

A member of the Aliyasantana or Marumakkathayam tarwad will be entitled to separate maintenance from the tarwad if there are good grounds for such allotment. What are proper grounds will depend upon the circumstances of each case. The cases show that where there is substantial inconvenience in living in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there and where there are several houses belonging to the tarwad and a member lives in one of them and where the karnavan's conduct has afforded a valid excuse for a member living away from the tarwad house separate maintenance may be awarded.

There may be other grounds which on social or economical reasons may be considered proper.

Though a member of an Aliyasantana or Marumakkathayam tarwad may not be entitled to a partition or a specific portion of the income which may be an indirect method of enforcing a partition, he is still a co-owner with the karnavan of the tarwad property and he may in a proper case be entitled to separate maintenance. Waiver (arising from conduct, etc.) is a good plea to a claim for past maintenance.

Raja Yerlagadda Mallikarjuna Prasada Nayudu v. *Raja Yerlagadda Durga Prasada Nayudu*, [(1901) I L R., 24 Mad , 147,(P C.)], followed.

Considering the special and common expenses which a yejman or karnavan has to incur out of the income of the family it is wrong to award a numerically proportionate share of the income to any particular member.

The law as to the respective rights of a yejman or karnavan and the junior member of the tarwad, discussed with reference to decided cases.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of South Canara, in Appeal Suit No. 82 of 1909, presented against the decree of A. P. P. SALDANHA, the District Munsif of Puttur, on Original Suit No. 887 of 1908.

The facts of this case are fully set out in the judgment.

B. Sitarama Rao for appellants.

K. Naraina Rau for respondents.

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* Second Appeal No. 1159 of 1910.

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MARADEVI v. PAMMAKKA.

JUDGMENT.—The suit in this case is one for arrears of maintenance instituted by 15 members of a family in South Canara governed by the Aliyasantana system of law, against its manager or ejmanthi, the defendant. The plaint alleges that the defendant left the family house of the parties and went away to reside elsewhere about five years before the date of suit, and that she neglected to look after the maintenance of the plaintiffs, junior members of the family. The defendant denied that she quitted the family house and contended that several of the plaintiffs were living away from the house. She alleges she has no objection whatever to maintain the plaintiffs if they all come and live in the family house. She denies the plaintiffs' right to separate maintenance when not living in the house. Her case is that the fourth plaintiff and her minor children, plaintiffs Nos. 10 to 12, were living in the house of the fourth plaintiff's husband, that the fifth plaintiff and her minor children (plaintiffs Nos. 13 to 15) were residing at the fifth plaintiff's husband's house and that the eighth and ninth plaintiffs were living in the house of their father. It is not stated that the plaintiffs Nos 1 to 3, 6 and 7 were living elsewhere.

The District Munsif found that the defendant was not living in the family house but in another house of her own about three miles away from the former and he held that the defendant had failed to maintain any of the plaintiffs during the period for which maintenance is claimed He also found that the plaintiffs Nos. 4, 5 and 8 to 15 had not been proved to have been living away from the family house though some of them might be visiting at the houses of their husbands or fathers. He awarded plaintiffs a $\frac{15}{40}$ths share of the income, the plaintiffs being 15 out of a total of 40 members in the family.

On appeal, the District Judge dismissed the suit by a judgment which we cannot but regard as unsatisfactory. He has not found whether the defendant went away from the family house to reside elsewhere or not. He objects to the Munsif's decree awarding to the plaintiffs a numerically proportionate share of the family income He is no doubt right in doing so. He says that the District Munsif's decree "further takes no account of the considerable time spent by the various plaintiffs in their fathers' or hubands' houses during which they were entitled to no maintenance at all in their family house. I

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cannot ascertain from this record how much, if any maintenance is really due to them." But he does not find what time, if any, each of the plaintiffs was away from the family house. He has assumed that a member going on a visit to the house of a relation, such as husband or father, would be disentitled to maintenance or that the ejman would be entitled to make a proportionate reduction from the maintenance due to that member. He then says: "It appears clear, however, that the ejmanthi has always been willing to maintain all those who lived and worked at home, and it is clear from the evidence of prosecution witness No. 4, who tried to hold a panchayat about the matter, that plaintiffs' real purpose is to live away from home in their husbands' and fathers' and wives' houses and do no work at home and yet draw their full share of maintenance from there. This they cannot do." Here again he has assumed, without discussing the question, that a person not doing work in the family house is not entitled to maintenance oven when he is willing to live there, for he has not decreed any maintenance to the plaintiffs Nos. 1 to 3 and 6 and 7 who the first defendant does not allege were living anywhere away from the family house. It is clear that we must set aside this judgment and remand the appeal for rehearing and fresh disposal. But as the Judge has enunciated several questionable propositions of Aliyasantana law, we consider it our duty in order to avoid a further remand, to express our view of the law which should govern the disposal of the suit.

According to the Aliyasantana system which is very similar in its incidents to the Marumakkathayam law [see *Subbu Hegadi* v. *Tongu*(1)] as no member of the family is entitled to enforce partition of the family property which belongs to all the members. Every junior member is entitled to be maintained by the karnavan and has the right to object to any improper administration of the property of the tarwad and to see that it is duly conserved for the use of the tarwad. The income belongs to all and all are entitled to participate in the benefit of it. But the manager is entitled to administer the property and to use the income for the common benefit of all the members. As observed in *Narayani* v. *Govinda*(2) "the tarwad is a family of which the karnavan is the manager, and although as a senior

(1) (1869) 4 M.H.C.R., 196. (2) (1884) I.L.R., 7 Mad., 352.

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member he enjoys special consideration, he has no higher claim in the enjoyment of the income than any other member of the family. He has a right to expend, as he pleases, for the common benefit of all. The right to maintenance is an individual right. In *Kunhammatha* v. *Kunhi Kutti Ali*(1) TURNER, C.J., says: "Each member of the tarwad has a right to be maintained and suffers a personal wrong if that right is not accorded to him." *Raman Menon* v. *Ittimayamma*(2). The right is not confined to cases where a member has no means of his own because by virtue of his ownership in the tarwad property he is entitled to participate in its income. See *Thayu* v. *Shungunni*(3). It has been held that a suit for maintenance by a junior member of a Marumakkathayam or Aliyasantana family is one that falls under article 127 of the Limitation Act—a suit to enforce the right to share in joint family property *Achutan Nair* v. *Kunjunni Nair*(4) and not one under article 129, which applies to suits which are strictly for a right to maintenance which a person has over property belonging to another. The tarwad property cannot be sold except in cases of necessity without the consent of the junior members. See *Kalliyani* v. *Narayana*(5) and *Raman Menon* v. *Raman Menon*(6). Junior members are entitled to recover on behalf of the family family property improperly alienated by the manager; see *Anantan* v. *Sankaran*(7). In other words, the right to maintenance in a Malabar tarwad is the mode in which the right of ownership is enforced As no one can enforce partition between the members and as it is the practice for all the members to live together in the same house, all are generally maintained in the tarwad house by the karnavan in whom the right of management is vested and one of whose primary duties is to maintain all the junior members according to the means of the family. The manager who is also the protector of the other members and the guardian in law of those who are minors has not only considerable discretion in his management of the property and the use of it for the benefit of the members but also considerable disciplinary power in the government of the household. To him must fall the allotment of

(1) (1884) I.L.R., 7 Mad., 233.
(2) (1899) 9 M.L.J., 153.
(3) (1882) I.L.R., 5 Mad., 71.
(4) (1903) 13 M.L.J., 499.
(5) (1886) I.L.R., 9 Mad., 266.
(6) (1901) I.L.R., 24 Mad., 73 (P.C.)
(7) (1891) I.L.R., 14 Mad., 101.

quarters to each of the members and if the family house is insufficient for the residence of all, the allotment of a separate house to some of them. As the governor of a family, sometimes consisting of numerous members he would naturally distribute also the work of the family and would have powers of correction over the members. But this right of his as the head of the family coexists with the rights of all the members as legal owners of the family property and the latter cannot be allowed to be seriously prejudiced by the former. See *P. Teyan Nāir* v *P. Rāgavan Nāir* (1). The law regulating the right of junior members to maintenance has been gradually developed in the decisions of this Court and it is necessary to state the position in which it now stands. In the earlier cases it was sometimes stated that the right of a member is only to be maintained in the family house, and that he has no right to maintenance if he resided elsewhere. But it will be observed that in some of these cases at least this statement was made in denial of the right of any member to enforce the payment to him separately of a proportionate share of the income Such a claim was regarded as an indirect attempt to enforce a right to partition which no member of a Marumakkathayam tarwad possesses. In Appeal No. 275 of 1858 (Tellicherry) and in Appeals Nos. 238 and 278 of 1860 (Tellicherry) such a claim to an aliquot part of the family income was negatived by HOLLOWAY, J. See Moore's "Malabar Law and Custom", pages 124 and 125. The statement that a definite share of the income cannot be claimed by a junior member is no doubt coupled, in one of these cases Appeal No. 275 of 1858, with the statement that "the junior members are not entitled to be supported out of the family house from the family property." But it is doubtful whether that learned Judge intended to lay down any such rigorous rule, for in another case, where also a proportionate share of the income was claimed by some junior members of a family, after negativing such a right, he abstained from decisively laying down that no member had a right to be maintained out of the family house. See Moore, page 125. The last case came up to the High Court in appeal and in dismissing the appeal FRERE, J. gave expression to the *dictum* that "the members individually are only entitled to maintenance in the family house; and the doctrine of English equity as to the

(1) (1882) I.L.R., 4 Mad., 171.

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right of *cestui quitrust* to call for an account has no application to a case like the present." *Kunigaratu* v. *Arrangaden*(1). It will be observed that the denial of the right to an account does not necessarily lead to a denial of the right to some portion of the income for maintenance outside the family house. FRERE, J., proceeded to explain his concurrence in the judgment of HOLLOWAY, J., who, as already pointed out, did not decide that there would be no right to separate maintenance. The next reported case, *Subbu Hegadi* v. *Tongu*(2), was one fromt he South Canara District and the parties were governed by the Aliyasantana law. There the plaintiff, a female member of the family, sued on behalf of herself and her children and grandchildren for maintenance, both past and future. She was living with her husband in his house. Her claim was resisted on the ground that she was entitled to no maintenance during the life of her husband who was bound to provide for her according to the usage obtaining in Canara. The Subordinate Judge negatived this contention and gave the plaintiff a decree. The Civil Judge on appeal held that an Aliyasantana husband was bound to support his wife and children, but confirmed the decree awarding the plaintiff maintenance from the family property. The special appeal was heard by SCOTLAND, C.J., and ELLIS, J. They dismissed the plaintiff's suit. They held that "the suit was obviously not brought to recover the necessary means of support but to obtain under the name of maintenance the separate enjoyment of a portion of the income of the property equivalent to the share of it which the plaintiff had failed to recover by her suit for a division. The claim in the plaint is very similar to that in the case of *Kunigaratu* v. *Arrangaden*(1), in which the suit was held not to be maintainable on the ground that it was an attempt to obtain indirectly relief which the plaintiff could not obtain directly." They then proceeded to consider whether the plaintiff could claim maintenance. They observe that "No decision could be based on any custom applicable to the parties." And that the case should be decided "on the reasonable effect to be given to the Aliyasantana law in regard to the rights of the family collectively and individually in the family property, and to the nature of the marriage relation." Reference is made to Bhutala Pandya's

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(1) (1864) 2 M.H.C.R., 12. (2) (1869) 4 M.H.C.R., 196.

work according to which no member has a right to partition " and the possession and control of the property belongs exclusively to the manager." They then observe, "so far the law appears to be settled, and imports clearly we think the preservation of the unity of family, as the only effectual mode of securing to the members severally a full share of the beneficial enjoyment of the joint estate. The obvious effect of allowing one or more members to quit the family and live apart on a portion of the income of the estate sufficient to support a position like that enjoyed by the other members would be to reduce the benefits of the family in a greater or less degree according to the number of the members who might choose to live separately on such allowances: and nearly as much so as by apportioning the shares of the corpus of the property on a division. It seems to us therefore that the pecuniary beneficial interest of the members individually in the family property is in its nature incompatible with the separation from the family." No objection can be taken to the statement that no member can claim either a proportional share of the income or a sufficient portion to enable him to maintain the same position outside the family as those who live in the family house do, for obviously it would cost more to support a person singly on the same scale of comfort than it would do if he lived in the family residence. But this does not logically lead to the conclusion that a member living away from the family is not entitled to anything out of the property for his maintenance. The judgment then refers to a passage relied on by the plaintiff in the suit from Bhutala Pandya's work which provides that if misunderstandings arise between the elder and younger sisters the elder shall provide the younger with a house and household articles and the opinion is expressed that the passage is not in favour of awarding separate maintenance. *Kunigaratu* v. *Arrangaden*(1) is also referred to as well as a statement by Mr. STRANGE in his " Manual of Malabar law " where the author says: " Females whether in alliance with males or not reside in their own families." It need hardly be observed that Mr. STRANGE's statement does no more than state the social practice of females residing in the tarwad house and in no way supports the inference that if they live with their husbands

(1) (1864) 2 M H C R , 12.

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they are not entitled to maintenance. The learned Judges finally say that a wife's residence with the husband must be treated as a separation from the family, as the union between the sexes according to the Aliyasantana law is not marriage but concubinage, and refer to the practice in Malabar of women continuing to live in their tarwads without residing with their husbands. They state that it will probably be found that the general law would impose an obligation on an Aliyasantana husband to support his wife and children, but do not rest their judgment on that ground. As the learned Judges expressly base their judgment on inferences to be drawn from the principles of Aliyasantana law, it may be permissible to point out, with all respect, that neither the social custom of married women living in their family house nor the absence of a right to an action for a definite share of the family income would seem to support the conclusion that a woman has no right to maintenance at all when she lives with her husband in his own house. The decision does not expressly deal with the right of male members to live outside the family house for purposes of work, education or other good causes. In *Peru Nāyar* v. *Ayyappan Nāyar*(1), KERNAN and MUTHUSAMI AYYAR, JJ., held that where a karnavan has been the cause of quarrels which necessitate a member leaving the family house, he would be entitled to separate maintenance. The same rule would apparently apply even though the quarrel may not be due to the karnavan but a member is obliged to leave the house in consequence of quarrels which the karnavan is not able to put an end to. If the karnavan does not allow a member to live in the family house or in consequence of ill-treatment makes it impossible or difficult for him to live there, there can hardly be any doubt that separate maintenance will be awarded. A decree for maintenance was also given where there were several houses belonging to the tarwad and the claimant lived in one of those houses. *C. K. Nallakandiyil Paradi* v. *C. K. Chathu Nambiār*(2). It was apparently not thought that the karnavan had the power in such a case to require any particular member to live in the tarwad house, and it was considered that it was not wrong on the part of a member in such a case to live away from the tarwad

(1) (1880) I.L.R., 2 Mad., 282. (2) (1882) I.L.R., 4 Mad., 169.

house. A further step was taken in *Chekkutti* v. *Pakki*(1), where separate maintenance was allowed to a junior member not living in the family house but in another house belonging to the tarwad. The Court observed that the karnavan did not contend that the plaintiff lived apart from him without his permission and contrary to his wish. But *C. K. Nallakandiyil Parvadi* v. *C. K. Chathu Nambiār*(2) does not recognize any right on the part of the karnavan to compel the residence of a member in a particular house, where there are more houses than one, belonging to the tarwad. Second Appeal No. 23 of 1882 also recognizes a right to separate maintenance where there is no room in the family house, a question on which apparently the Court is at liberty to arrive at its own finding. In *Raman Menon* v. *Ittimayamma*(3) SUBRAMANIA AYYAR and MOORE, JJ., held that a woman living with her children in a house belonging to her own tarwad would not be disentitled to maintenance by occasionally leaving that house in order to visit her husband in his own house. Mr MOORE referring to this decision in his book on Malabar law observes: "It must be admitted that this decision read with that arrived at in *Parvathi* v. *Kamaran*(4) leaves the law as to this question in a very doubtful condition." That is, they are not in accordance with any strict doctrine of the right to maintenance being limited to cases where a member lives in the tarwad house. *P. Teyan Nāir* v. *P. Ragavan Nāir*(5), is an important decision for it recognizes the principle that the right to maintenance is not conditional on a member being of good behaviour. The learned Judges INNES and TARRANT, JJ., observe: "A tarwad does not differ in this respect from an ordinary Hindu family, the manager of which is not entitled to exclude the members from a right to participation of some portion of the income of the family property." The karnavan's right to require a member to obey him cannot override the latter right to maintenance. In *Krishnan* v. *Govindan Menon*(6), SUBRAMANIA AYYAR and MOORE, JJ, held that a junior member was not entitled to be paid by the karnavan the expenses incurred by him for being educated in an English school in a place distant from the tarwad house. The karnavan contended that he was not bound to

(1) (1889) I.L.R., 12 Mad., 305.
(2) (1882) I.L.R., 4 Mad., 169.
(3) (1893) 9 M.L.J., 153.
(4) (1883) I.L.R., 6 Mad., 341.
(5) (1882) I.L.R., 4 Mad., 171.
(6) (1898) 8 M.L.J., 294.

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defray the expenses of the plaintiff's education in the English language and that he was willing to give the plaintiff such education in his own place as was practicable there. The suit was not framed as one for maintenance generally and the question was not therefore considered whether a person leaving the family house for the purpose of attending a school, even though it is not agreed to by the karnavan is not entitled to separate maintenance. In *Kesava* v. *Unikkanda*(1), BRANDT and PARKER, JJ., held that, where the karnavan himself had left the family house separate maintenance might be awarded to a junior member who does not live there.

The cases cited above show that where there is substantial inconvenience in living in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there and where there are several houses belonging to the tarwad and a member lives in one of them and where the karnavan's conduct has afforded a valid excuse for a member living away from the tarwad house, separate maintenance may be awarded.

The general result of the decided cases is in our opinion that in order that a member of a Marumakkathayam or Aliyasantanam tarwad may be entitled to separate maintenance he or she should be able to allege some good ground for doing so. It would be unwise to hold that the decisions up to date have exhausted the list of good grounds which may be urged. It is the recognized practice in South Canara for a woman and her minor children to live with her husband. See *Subbu Hegadi* v. *Tongu*(2). It is a common practice in North Malabar and it is a growing practice in South Malabar. See *Parvathi* v. *Kamaran*(3). The interests of social improvement would be against discouraging such a practice. There is no principle in the Marumakkathayam or Aliyasantana law requiring that it should be discouraged. The only principle which has ever been relied on against the award of separate maintenance is that the family property should not be diminished by such award. But this does not require anything more than that in determining the rate of maintenance more should not be allowed than would be received by the claimant if he resided in the family

(1) (1888) I.L.R., 11 Mad., 307. (2) (1869) 4 M.H.C.R., 196.
(3) (1883) I.L.R., 6 Mad., 341.

house along with its other members. We are not bound to shut our eyes to the fact that families governed by this system of law are often numerous and consist of persons related in very different degrees of kindred and no social or economical service is done by compelling them all to reside in one house where they have good grounds for not doing so. Several cases have come up to this Court which show that in the houses of Rajas and other well-to-do tarwads it is the rule to allow separate maintenance. If a member lives away from the tarwad house for an improper purpose, that would be a good ground for refusing separate maintenance. What purposes are proper and what improper may be safely left to the decision of courts. It may happen that the husband of a woman is not able to support her fully. To force her to live in the tarwad house in such a case under the penalty of being refused all maintenance can only be a disadvantage both to her and to the tarwad. Similarly a male member may be willing to earn a part of his maintenance by doing elsewhere work which may not be available near his own house. It would equally be a disadvantage in such a case both to him and to his family if maintenance from the family income were altogether withheld from him. It is not alleged in this case that any one of the plaintiffs Nos. 4 to 15 was living away from the family residence for a purpose which can be regarded as otherwise than proper. The suit is one for past maintenance and in such a case it would no doubt be open to the Court to infer from the conduct of any of the plaintiffs that he or she waived the right to maintenance during any portion of the period in question. It may be sufficient to show that the conduct of the party was such as to lead to a reasonable inference of waiver of any claim for maintenance against the ejmanthi. On this point see *Raja Yarlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Durga Prasada Nayudu*(1). But in the absence of such waiver the right to maintenance cannot be refused. The District Munsif was certainly wrong in dividing the total income of the property into as many shares as there are members and in awarding a 15/40ths share to the plaintiffs on the principle of an equal share to each member. The karnavan has to defray the expenses of all ceremonies in the family. He has to keep up the

(1) (1901) I.L.R., 24 Mad., 147 (P.C.).

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house and other family properties. The principles on which maintenance should be calculated are laid down in the judgments of this Court in *Nārāyani* v. *Govinda*(1) and *Kunhammatha* v. *Kunhi Kutti Ali*(2).

On the conclusion we have come to it will be unnecessary for the lower Appellate Court to decide whether the defendant left the family house as alleged by the plaintiffs. But the question how long any of the plaintiffs resided away from the family house and the circumstances under which he or she did so will have to be decided in order that a conclusion may be come to on the question whether the claim to maintenance for the period in question or any portion thereof can be held to have been waived by any or all of the plaintiffs.

With these observations we reverse the decree of the lower Appellate Court and remand the appeal for fresh disposal in the light of our remarks. The costs in this Court will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1912, January 24.

S. KRISHNAMA CHARLU AND ANOTHER (RESPONDENTS AND COUNTER-PETITIONERS), APPELLANTS,

v.

S. VENKAMMAH (MINOR BY GUARDIAN AND FATHER) AND R. LAKSHMANA CHARLU—(PETITIONER), RESPONDENTS.*

Succession Certificate Act (VII of 1887)—Certificate to a minor can be granted—Sec. 9, no bar.

A succession certificate can be granted to a minor.

Per curiam · Section 9 of the Succession Certificate Act (VII of 1889) presents no difficulty to the grant in such a case.

Kali Coomar Chatterjea v. *Tara Prosunno Mookerjea* [(1879) 5 C L.R., 517-9] and *Ram Kuar* v. *Sardar Singh*, (1893) I L.R. 20 All, 352 followed.

Ex-parte *Mahadeo Gangadhar*,[(1904) I.L.R. 28 Bom.], 344 and *Gulabchand* v. *Moti*, [(1901) I.L R, 25 Bom., 523], considered.

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(1) (1884) I.L R., 7 Mad , 352. (2) (1884) I.L.R., 7 Mad., 233.

* Appeal Against Order No. 19 of 1911.

APPEAL against the order of J. W. HUGHES, the District Judge of Kurnool in Civil Miscellaneous Petition No. 166 of 1909.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

KRISHNAMA CHARLU v. VENKAMMAH.

B. Narasimha Row for the appellants.

The Hon. Mr. *T. V. Seshagiri Aiyar* for the respondents.

JUDGMENT.—The question raised before us in this appeal is whether a succession certificate can be granted to a minor on an application made by him through his natural guardian. We answer the question, which is not absolutely free from difficulty, in the affirmative. Apart from section 9 of the Succession Certificate Act VII of 1889 which we shall consider generally, there is nothing in the Act which precludes a minor from applying for a certificate, while we find that sections 8 to 13 of Probate and Administration Act V of 1881 prohibits grants of probate and letters of administration to minors. If the minor is the heir of the deceased, as is the case, the property will vest in him and he would be the person entitled to institute suits to recover debts due to the estate. Section 4 of the Succession Certificate Act lays down that no Court shall pass a decree against a debtor of the deceased person in favour of a person claiming to be entitled to the effects of the deceased except on the production by the person so claiming of a certificate issued under the Act. Now if where a minor is so entitled, the certificate were to be granted to his guardian as suggested in Ex parte *Mahadeo Gangadhar*(1) the requirements of section 4 would not be satisfied; and if the certificate could not also be granted to the minor as held in *Gulabchand* v. *Moti*(2) the result would be that no suit could be instituted at all during the minority of the heir, a result which could not have been contemplated by the legislature. Section 9 no doubt lays down that whenever the Court considers it desirable to take security from the applicant, it shall require him to execute a bond with two sureties, and it is argued that, as a minor cannot execute such a bond, it must be held he is incompetent to apply for a certificate. But we think that execution of the bond by the guardian on behalf of the minor applicant would bind the minor and thus satisfy the provisions of section 9. In our opinion, therefore, this section does not present any serious difficulty. We may observe with reference to the Bombay decisions that the

(1) (1904) I.L.R., 28 Bom., 344. (2) (1901) I.L.R. 25 Bom., 523.

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attention of the learned Judges who decided these cases, does not appear to have been drawn to the difficulty that would arise in collecting debts of the minor heir of a deceased person, if this view of the law were to be accepted as sound.

On the other hand the Calcutta and Allahabad High Courts have held in *Kali Coomar Chatterjea* v. *Tara Prosunno Mookerjea*(1) and *Ram Kuar* v. *Sardar Singh*(2) that a certificate can be granted to a minor. We think this is the correct view and dismiss the appeal with costs.

APPELLATE CRIMINAL.

Before Sir Charles Arnold White Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Ayling.

1911 October 6, 10 & 13. 1912 February 28 & 29, and March 15

In re P. VENKATA REDDY (ACCUSED IN CALENDAR CASE No. 1 OF 1911 ON THE FILE OF THE JOINT MAGISTRATE'S COURT OF GODAVARI), PETITIONER.*

Indian Penal Code (Act XLV of 1860), sec 499—Defamation—Absolute privilege, doctrine of, applicable under sec 499—Accused, statement of, in course of judicial proceedings.

A person charged with an offence was on his trial asked by the Magistrate what he had to say and in reply made a statement defamatory of one of the prosecution witnesses

Held that the statement was absolutely privileged and that he was not liable to be punished in respect thereof for an offence under section 499, Indian Penal Code. Although the English doctrine of absolute privilege is not expressly recognized in the section, it does not necessarily follow that it was the intention of the legislature to exclude its application from the law of this country.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the judgment of F. W. R. ROBERTSON, the Joint Magistrate of Godavari, in Calendar Case No. 1 of 1911.

The facts of this case are set out in the order of SPENCER, J.

B. Narasimha Rao for the petitioner.

J. L. Rozario, Acting Public Prosecutor on behalf of Government.

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(1) (1879) 5 C.L.R., 517. (2) (1898) I.L.R., 20 All., 352.

* Criminal Revision Case No. 216 of 1911.

ARNOLD WHITE, C.J., SANKARAN NAIR AND AYLING, JJ.
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In re VENKATA REDDY.

This case first came on for hearing before the Hon'ble Mr. Justice SPENCER who made the following

ORDER :—The petitioner was accused in a case of hurt brought against him on the complaint of a relative. At the close of the examination of the accused he caught one of the prosecution witnesses by the arm and dragging him before the Magistrate declared that he was a rogue and a forgerer The Joint Magistrate of Gōdāvari, who tried the case of defamation arising out of these words, has found that the expressions were part and parcel of the accused's defence statement, or in other words, that they were made in the course of a legal proceeding He has also found a want of good faith. These findings may be accepted. On them the petitioner has been convicted and fined *Rs. 20 for an offence under section 500, Indian Penal Code.*

The learned vakil who appears for the petitioner in the Revision Petition claims "absolute privilege" for this statement on the strength of the rule of English Law that "no action of libel or slander lies whether against judges, counsel or witnesses or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognized by law." He maintains that this principle has been applied so far as this Presidency is concerned to the case of judges, counsel, witnesses and accused

If the course of decisions in this Presidency had been quite uniform, I should feel bound to follow it in spite of my own opinion that the principle laid down in *Emperor* v. *Ganga Prasad*(1), is the correct one. KNOX, C J., observed there, "it appears to me that since the code was enacted, the question is one which has to be decided by the Indian Penal Code and by the Evidence Act of 1872, and not by any maxim, however excellent that maxim may be, which has been universally recognised in England, but has not obtained universal recognition in this country, unless indeed it can be shown beyond room for reasonable doubt that the question was never considered in either Code" He proceeded to discuss the bearing of section 105 of the Evidence Act on the exceptions to section 499 of the Indian Penal Code. It seems monstrous that an accused person, just because he happens to occupy the position of an accused, should be entitled

(1) (1907) I.L.R., 29 All., 685 at p. 696

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to utter any malicious untruths that may come into his head and so wantonly defame the complainant's character. The common instance may be given, so far as my experience extends in this Presidency, of an accused person alleging without good faith that his prosecution is due to his having enjoyed immoral intimacy with one of complainant's female relations. A blackguardly attempt to besmirch the honour of a family in retaliation for an honest prosecution ought to be punishable at law and according to the Indian Penal Code it is. But in this Presidency the decisions are not all one way, so far at least as accused persons are concerned

The case of *Hayes* v. *Christian*(1), may be briefly passed over as it was found there that the accused did not use the words complained of in the *ordinary course* of any legal proceeding. The cases of *Hinde* v. *Baudry*(2), *and Nadu Gounden* v. *Nadu Gounden* 3) can easily be distinguished because the defendants were found to be entitled "to the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interest." The Court implied that the result would have been different if the defendants had used the occasion 'for the gratification of private ill-will.' In Criminal Revision Case No. 76 of 1899 MOORE, J., laid down what appears to me to be the correct principle that the case of a party to a criminal proceeding, who is prosecuted criminally for defamation in connection with statements made by him as such, must be dealt with under the principles laid down in the Indian Penal Code. SUBRAHMANIA AYYAR, J., who sat with him, found it difficult to reconcile this view with the *ratio decidendi* of *Manjaya* v *Sesha Shetti*(4). But he ultimately decided to uphold the conviction on the ground that the prisoner's statement (that the grandfather once kept the complainant's wife as his concubine) was false and malicious and therefore the ends of justice did not call for the High Court's interference. That case stands on a similar footing with the present as regards the facts. Now the policy which determined the decision of *Manjaya* v. *Sesha Shetti*(4), is intelligible. It is that witnesses should not be exposed to the fear of prosecution except for perjury. The same reasoning will apply to the case of persons examined by

(1) (1892) I.L R , 15 Mad , 414.
(2) (1876) I L.R , 2 Mad., 13
(3) (188?) 1 Weir, 589.
(4) (1888) I.L R , 11 Mad., 477.

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the police in the course of a criminal investigation under section 161, Criminal Procedure Code, for if they do not tell the truth they are liable to prosecution for giving false information to a public servant (section 182, Indian Penal Code)—*vide Queen-Empress* v. *Govinda Pillai*(1). So also with parties to civil suits who like witnesses may be prosecuted for giving false evidence, if they speak falsely—*vide In the matter of Alraja Naidu*(2). The case of counsel has to be specially considered, for as observed by the Master of the Rolls in *Munster* v. *Lamb*(3). "If any one needs to be free of all fear in the performance of his arduous duty an Advocate is that person"—*vide Sullivan* v. *Norton*(4). Public policy demands also that Judges should be protected from the consequences even of words uttered by them "falsely, maliciously and without reasonable cause," as it is for the benefit of the public that they should discharge their functions without favour and without fear—*vide Raman Nayar* v. *Subramanya Ayyan*(5) But it is not for the benefit of the public that accused persons should be permitted to slander their accusers with impunity, and as pointed out by MOORE, J., in *Nadu Gounden* v. *Nadu Gounden*(6) already quoted, they cannot be prosecuted for giving false and defamatory statements while under examination under the law as it stands at present in India.

In the case of *In re Govindappa*(7), the provisions of section 499, Indian Penal Code, were applied and the statements were found to have been made in good faith for the protection of the interests of the persons making them In the case of *Murugesa Pillai* v. *Papathi Ammal*(8), the statement of the Counsel that he had kept the complainant as his concubine was found to be true and relevant as showing the motive for the complaint. In the present case the accused's statement that the witness was a rogue and forgerer might have been relevant, if true, but no attempt was made to prove it to be true, and the defence at the trial of defamation was a denial of having made it.

In dealing with the present Revision Petition I should be inclined to follow the law as laid down by MOORE, J., in dealing

(1) (1893) I.L.R., 16 Mad. 235
(2) (1907) I.L.R., 30 Mad., 222
(3) (1883) 11 Q.B.D. 588
(4) (1887) I.L.R., 10 Mad., 28 at p. 34
(5) (1894), I.L.R., 17 Mad., 87
(6) (1880) 1 Weir's G.R., 580
(7) (1884) I.L.R., 7 Mad., 36.
(8) (1897) 1 Weir's Law of Offences and Criminal Procedure (Criminal rulings), 612

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with the statements of an accused person, but I cannot shut my eyes to the fact that there has been a general tendency in this High Court to apply the principle of English Law of "absolute privilege" freely to all parties whether they are parties to Civil or Criminal cases, with the exception of that one case, and in that case SUBRAHMANIA AYYAR, J., was inclined to dissent from the view of MOORE, J. In this connection I may refer to two recent unreported cases [Second Appeal No. 250 of 1906 —*Pachaiperumal Chettiar* v *Dasi Thangam*(1)—and Criminal Revision Case No. 295 of 1908] which applied the English rule to accused persons and to parties generally, rather than the provisions of the Penal Code and the Evidence Act. It is also stated in Gour's Penal Law of India, paragraph 4174, page 2129. that statements of judges, counsel and parties, even though they be not made in good faith, are according to the view of the Courts at Calcutta, Madras and Bombay protected because they are made before a Judge while according to the Courts of Allahabad and the Punjab such statements possess no special immunity but must be judged by the ordinary standard of other privileged statements. If this is correctly stated to be the general trend of decisions of the Madras High Court, I feel some doubt if I can follow MOORE, J., in the above ruling and I therefore direct the case to be placed before a Bench of two Judges of this Court. I may add that as regards other High Courts the decisions are not so uniform as the above extract from Mr. Gour's book would lead one to suppose, for instance in *Augada Ram Shaha* v. *Nemai Chand Shaha*(2), the theory of qualified privilege judged by the Indian Penal Code is laid down for statements of parties but in *Golap Jan* v. *Bolanath Khettry*(3), absolute privilege is considered to be their right.

In accordance with the above order, this case again came on for hearing before SUNDARA AYYAR and PHILLIPS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The order of SPENCER, J., directing the case to be posted before a Bench of two Judges cites the principal cases on the point arising for decision in this case, namely, whether the statement of a person charged with an offence, when asked by the Court what he had

(1) (1908) I L R, 31 Mad, 400. (2) (1896) I L R, 23 Calc, 867.
(3) (1911) I L.R, 38 Calc, 880; S C., 15 C.W N, 917.

to say, is an absolutely privileged statement so as to absolve him from liability to be punished for an offence under section 499, Indian Penal Code. There is much conflict of authority on the point. The question is one of considerable importance and likely to arise frequently. We therefore consider it desirable that it should be decided by a Full Bench, and accordingly refer the following question :—

Is the statement of a person charged with an offence in answer to a question by the Court trying him, "What have you to say," an absolutely privileged statement so as to make him not liable to be punished for an offence under section 499, Indian Penal Code, in respect of the statement?

And lastly upon perusing the petition and judgment of the lower Court and record in the case and order of reference of this Court, the Court expressed the following opinion :—

CHIEF JUSTICE.—The question which has been referred to us is this—"Is the statement of a person charged with an offence in answer to a question by the Court trying him "What have you to say," an absolutely privileged statement so as to make him not liable to be punished for an offence under section 499, Indian Penal Code, in respect of the statement?" There can be no question that under the law of England the occasion would have been absolutely privileged. Mr. Rosario, who argued in support of the view that under the law of this country the statement was not privileged unless the prisoner could show that it was made in good faith within the meaning of the ninth exception to section 499 of the Indian Penal Code, has conceded this The law of England is that there are occasions when it is for the public interest that persons should not be in any way fettered in their statements In this case the privilege is absolute and no action lies for words spoken. The occasions are (1) Parliamentary Proceedings, (2) Judicial Proceedings and (3) Naval and Military affairs, and the affairs of State generally See Odgers on 'Libel and Slander,' 5th Edition, page 230

With regard to the absolute privilege in the case of judicial proceedings under the English law, I need only refer to the leading case of *Dawkins* v. *Lord Rokeby*(1), and the judgment of LOPES, L.J., in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*(2). The Lord Justice said 'The

(1) L.R., 7 H.L., 744 S.C., (1873) L.R., 8 Q.B., 255
(2) (1892) 1 Q.B. 431, at p. 451.

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authorities established beyond all question this: that neither party, witness, counsel, jury nor judge can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed."

The question we have to determine is whether this Common law doctrine of absolute privilege is part of the law of this country, or whether on the true construction of section 499, Indian Penal Code, the law of defamation as laid down in that section excludes the application of this doctrine. The contention in support of the latter view was that the law of defamation, so far as this country was concerned, was created by section 499, and inasmuch as that section contains no reference to this English common law doctrine of absolute privilege, it should be inferred that it was the intention of the legislature that it should form no part of the law of this country. In my opinion, it does not necessarily follow that, because this doctrine is not expressly recognised in the section, it was the intention of the legislature to exclude its application from the law of this country. The provisions of the Indian Penal Code and also those of the Evidence Act of 1872 are mainly based upon the English law and it is to be observed that, whenever the legislature in this country intended to depart from the English law, they made their intention clear by express enactment. As regards the Evidence Act, I may refer to section 132 and section 167. As regards section 499 of the Penal Code, the legislature has made it clear, by express enactment, that in certain respects they intended to depart from the English law of libel and slander. For instance, under the Penal Code, slander of a private person is a criminal offence: it is not so in England. It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English law with regard to the question of absolute privilege; and it seems to me that in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference. Mr. Rosario

argued that only a qualified privilege existed in connection with the occasion of judicial proceedings and that the plea of privilege was only open to counsel, party, witness or prisoner subject to the obligation of proving that the imputation conveyed by the defamatory statement was made in good faith within the meaning of the ninth exception to section 499. If this were so, one would have expected to find amongst the exceptions and illustrations in section 499 some reference to a case of qualified privilege in connection with a statement made in the course of judicial proceedings. Not only do we find no reference to a case of absolute privilege as recognised by the law of England, but we find no reference to any case of qualified privilege in connection with judicial proceedings. The inference which I should draw from this would be that it was not the intention of the legislature to exclude the application of this doctrine of the English Common law from the law of defamation in India The *exceptions* would seem to have been drafted with reference to the occasions of qualified privilege as recognised by the law of England, omitting all reference to the question of privilege in connection with statements made in judicial proceedings or to the other classes of absolute privilege recognised by the law of England. There may be said to be five groups of exceptions to the section, all relating to occasions as to which qualified privilege is recognised. Exception I corresponds to the plea of justification. Exceptions II, III, V and VI correspond to the plea of fair comment, on a matter of public interest. Exceptions VII and VIII cover the cases of censure by a lawful authority passed in good faith, and accusation made to a person in lawful authority in good faith. Exceptions IX and X cover the cases of imputation made in good faith by a person for the protection of his interests or for the public good, and the case of caution intended for the good of the person to whom it is conveyed or for the public good. Exception IV covers the plea of fair report of public proceedings.

I do not think that the canons of construction laid down by Lord HERSCHELL in *Bank of England* v. *Vagliano Brothers*(1) are applicable here. His Lordship said "I think the proper course is in the first instance to examine the language of the statute and

(1) (1891) A.C., 107 at pp. 144 and 145.

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to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." Now the English Bills of Exchange Act, which was the subject of Lord HERCHELL's observations, was a statute passed with the object of codifying the law as it then stood. The object of section 499 of the Code was to constitute defamation a criminal offence on lines which, generally speaking, follow the English law of libel and slander. It was not intended to codify existing law but to create new law so far as this country was concerned.

This being so, in considering the intention of the legislature I think we are certainly warranted in taking into consideration what the law of England was at the time the Indian enactment was passed. If we are to seek for protection of witnesses and prisoners only within the four corners of section 499 of the Indian Penal Code or within the four corners of that enactment and the provisions of the Evidence Act, it seems to me that rather startling results would follow. In section 132 of the Evidence Act the legislature departed from the English law and enacted that a witness should not be excused from answering a relevant question on the ground that the answer would tend to criminate him, with the proviso that no such answer which a witness is compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. The protection given by the proviso is limited to criminal proceedings. If we are to look to the statute law of this country alone, the result would be that, unless a witness could prove good faith he would if compelled to answer, be protected from a prosecution in respect of an incriminating statement, but he would not be protected against a suit for damages. Mr. Rosario contended that the words of the proviso were wide enough to include civil, as well as criminal, proceedings. But, in my opinion, they are not. Again, if the privilege of a prisoner is to be ascertained by reference, and only by reference, to the provisions of section 499 of the Penal Code, a prisoner who

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stated, in answer to a question put to him by the Court, that the witnesses for the prosecution had not spoken the truth, would, unless he could discharge the onus of showing that he made the statement in good faith, be liable to be prosecuted for the statement, and would also be liable to suits for damages at the hands of all the witnesses to whom he had imputed the giving of false evidence. It might even be said, if the occasion is not absolutely privileged and the question of privilege is to be considered only with reference to the provisions of section 499, a prisoner who pleaded not guilty, unless he could show that his plea was made in good faith, would be subject to criminal or civil proceedings. I cannot bring myself to believe that the legislature in enacting section 499 intended to bring about such a result as this.

As regards the authorities in this country, conflicting views have been taken. Speaking generally, the trend of the decisions in the Madras and Bombay High Courts is that the occasion is absolutely privileged. The trend of the Allahabad and Calcutta decisions is the other way. We have however, a decision of the Privy Council which is reported in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*(1) which clearly recognises the rule of the English Common law as applicable in this country. In that case their Lordships pointed out that the suit, though called a suit for defamation, was in substance an action for malicious prosecution. The judgment runs.—"Their Lordships are of opinion, with the High Court, that if it had been, strictly speaking, such an action, it could not have been maintained; for they agree with that Court that witnesses cannot be sued in a Civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognised by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages, but that the only penalty which they should incur if they give evidence falsely should be indictment for perjury."

(1) (1873) 11 Beng. L.R. 321 (P.C.)

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It is true that this opinion was expressed with reference to a civil action for damages and there is no reference to criminal proceedings. But as regards the question of principle this, as it seems to me, makes no difference. As to this, see the judgment of SHEPPARD, J., in *Manjaya* v. *Sesha Shetti*(1). It is no doubt true that when the trial in which the question arose was held in 1866 the law of evidence had not been codified. But I do not think this has much bearing on the question that we have to decide, since section 499 of the Penal Code was in existence when this question arose for consideration before the Privy Council. Although Their Lordships do not refer to the *section*, it, of course, cannot be assumed that they did not consider its effect. The passage in the judgment above set out is, to my mind, a clear pronouncement to the effect that the English Common law doctrine applies in India. Their Lordships describe the doctrine as "recognised by all the Courts of this country," and "one based upon principles of public policy." As regards Madras decisions, in *Murugesa Pillai* v. *Papathi Ammal*(2) a statement made by a prisoner that the complainant was kept by him as his concubine some years and was afterwards in the keeping of another person was held to be privileged. The ground of the decision, however, was that the statement was true and fell within exception IX to section 499. In *Nadu Gounden* v. *Nadu Gounden*(3), it was found that the defamatory statement made by the accused in answer to a question if he had anything to say, was false and not made in good faith, MOORE, J., was of opinion that the question of privilege must be decided with reference to the provisions of section 499. SUBRAMANIA AYYAR, J. was of opinion that the occasion was absolutely privileged. In *Manjaya* v *Sesha Shetti*(1) it was held that the statement of a witness while under cross-examination before a Criminal Court was absolutely privileged. In the case of *Bayes* v. *Christian*(4), this Court held that where a person who was defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character, the occasion was not privileged. The Judge no doubt

(1) (1888) I L R, 11 Mad, 477.
(2) (1897) 1 *Weir's Criminal Rulings* 612
(3) (1889) 1 Weir's Criminal Rulings 580
(4) (1892) I L.R, 15 Mad, 414

took the view that the question should be considered with reference to the provisions of section 499. But they pointed out in connection with the English law that the words complained of could not be said to have been used *in the ordinary course* of a legal proceeding. In *In the matter of Alraja Naidu*(1), the statement by a prisoner was considered to be absolutely privileged. The same view was taken in *Pachaiperumal Chettiar* v. *Dasi Thangam*(2), but there, there seems to have been a finding by the Judge who tried the case, that the questions which constituted the defamation were put in good faith. In the case of *Padmarazu Pantulu* v. *Venkatramana Aiyar*(3), where the questions had been put in cross-examination by a vakil and the client who instructed the vakil was charged with defamation, the privilege was held to be absolute. In *Adapala Adivaramma* v. *Rabala Ramachendra Reddy*(4), where a suit for damages was brought in respect of a statement in an affidavit, the statement was held to be absolutely privileged. In the last reported Calcutta Case, *Golap Jan* v. *Bhola Nath Khetry*(5), the learned Judges with reference to a complaint to a magistrate, held that even if the complaint was defamatory, "the complainant was entitled to protection from suit, and this protection was the absolute privilege accorded in the public interest to those who make statements to the courts in the course of, and in relation to, judicial proceedings." The protection thus described is certainly not to be found within the four corners of section 499 of the Penal Code. I do not think that this view can be reconciled with the view taken in some of the earlier Calcutta cases. See for instance *Queen* v *Pursoram Doss*(6), *and Augada Ram Shaha* v *Nemai Chand and Shaha*(7) where it was held that a defamatory statement made in the pleadings in an action is not absolutely privileged, and the cases reported in *Greene* v *Delanney*(8). As regards Bombay, it was held in *Nathji Muleshvar* v. *Lālbhāi Ravidat*(9), that no action for slander lies on any statement in the pleadings or during the conduct of suit against a party or witness. SARGENT, C.J., held that the rule of the English Common law was

(1) (1907) I L R., 30 Mad., 222
(2) (1908) I L R., 31 Mad., 400
(3) (1909) 19 M L J., 217.
(4) (1910) 8 A.N. 155
(5) (1911) I L R., 38 Calc., 880 at p 888.
(6) (1865) 3 W R (Cr R), 45.
(7) (1896) I.L R., 23 Calc., 867
(8) (1870) 14 W.R (Cr R.), 27
(9) (1890) I L R., 14 Bom 97 at p 100

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The facts of this case are stated in the judgment of SADASIVA AYYAR, J., on the order of reference to the Full Bench.

T. V. Gopalaswami Mudaliar for appellant.

V. Visvanatha Sastri for respondent.

AYLING, J.—The facts of the case are fully and clearly set forth in the judgment of my learned brother, which I have had the advantage of perusing. The only point with which we are concerned is whether the Subordinate Judge was entitled to reduce the rate of interest specified in the suit bond.

As regards the preliminary objection that the matter is covered by the oath taken by the plaintiff and that the defend ant is thereby precluded from asking for relief against the high rate of interest, I have no hesitation in agreeing with the learned Judge who disposed of the Revision Petition. Apart from this, the question whether the decree of the Subordinate Judge, in so far as it modified the terms of the contract as regards interest, should be upheld, is one of some difficulty; and, with all diffidence, I may say that it seems to me of the utmost importance to observe the distinction between what a Court *may* do and what a Court *should* do. The matter is considered from both points of view by the learned Judges in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar* (1) and, while setting forth cogent reasons for refusing to modify the contract terms as to interest merely because of the high rate provided for, they further lay down that section 74 of the Contract Act does not authorize a Court to interfere in cases where no interest at all is provided for except in case of default of payment. If this latter view is correct, there can be no doubt that the Subordinate Judge in the present case was wrong; the facts of the present case are practically identical with those of the reported case But, with all deference, I agree with my learned brother in doubting whether any distinction should be drawn between such cases and cases of enhancement of interest in default. I do not understand their Lordships to mean that a case of the latter description could not come within the purview of section 74 of the Contract Act, however inexpedient it might be to grant relief; and, looking to the very wide wording of the body of the section, I cannot see why an agreement to pay a high rate of interest in default of payment of a specified sum on a specified

(1) (1902) I.L.R., 25 Mad., 343.

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date should not be regarded as a stipulation by way of penalty merely because no interest would have been payable except in case of default.

In this view, I agree to the reference proposed by my learned brother. Whether relief should have been granted, is a very different matter. I am fully alive to the reasoning of the learned Chief Justice and DAVIES, J., in the case referred to—*Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(1)—and to the dangers of holding a rate of interest to be unreasonable merely because it seems to the court (possibly in ignorance of all the facts of the case) to be unduly high. Very similar views are expressed by two Benches of the Calcutta High Court—*Satish Chunder Giri* v. *Hem Chunder Mookhopadhya*(2) and *Umesh Chandra Khasnavis* v. *Golap Lal Mustafi*(3)—though in neither case was the applicability of section 74 of the Contract Act considered, but only the question of whether relief should be given on general principles of equity. To what extent weight should be given to these views or to the doctrines laid down in English cases referred to by my learned brother is a matter, which must, in my opinion, be decided with primary reference to the facts of each individual case in order to determine whether the discretion vested in the Court by section 74 (if it be so vested) should be exercised, and, if so, to what extent.

SADASIVA AYYAR, J.—The plaintiff sued on an instalment bond, dated the 24th April 1907 for Rs. 71-0-0 payable at ½ a rupee per month in 142 monthly instalments. (Even from the monthly instalment of 8 annas, the defendant seems to have been entitled to deduct the profits on the defendant's two shares in the auction chit conducted by the plaintiff and to have been bound to pay only the balance). The defendant paid up 29 instalments of the 142 instalments regularly. He made default in paying the 30th instalment of 8 annas (due on the 5th January 1908) after deducting 1 anna 4 pies due as profits. The instalment bond provides that on such default, the defendant should pay interest at 3 pies *per diem* on the 8 annas for the 7 days of grace allowed to him to pay up the defaulted instalment. As he did not so pay up the defaulted instalment,

(1) (1902) I.L.R., 25 Mad., 343. (2) (1902) I.L.R., 29 Calc., 823.
(3) (1904) I.L.R., 31 Calc., 238.

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the total amount of all the remaining instalments became at once payable according to the terms of the bond with the exorbitant interest of 1 pie per rupee per day which is a little more than 190 per cent. per annum. The plaintiff accordingly sued for recovery of the Rs. 51-8-0 due for the 103 defaulted instalments *plus* Rs. 153-12-0 as interest for about 19 months.

The defendant seems to have raised two defences—

(*a*) that he had made further payments than were admitted by the plaintiff; and

(*b*) that the rate of interest was penal and should be relieved against.

The defendant challenged the plaintiff to take oath, evidently on the first head of the defence and the plaintiff took oath accordingly. The Subordinate Judge had, therefore, to find that the defendant did make default from the 30th instalment of the bond (58th from the beginning of the chit), but on the question of the rate of interest the Subordinate Judge evidently held that the rate of 190 per cent. per annum was a penal provision and reduced it to 24 per cent. and decreed for the amount arrived at on such calculation.

In the Revision Petition to the High Court by the plaintiff on the question of the reduction of the rate of interest by the Subordinate Judge, the plaintiff raised two contentions, viz.,—

(*a*) that, because he had taken oath as to the facts alleged in the plaint, the defendant could not raise the question of law in respect of the penal character of the rate of interest, and

(*b*) that, even if the legal question could be raised, the Subordinate Judge erred in law in deciding that the provision in the bond for payment of 190 per cent. as interest is penal and could be relieved against.

The matter came before a single Judge of the High Court, and the learned Judge held that the question of the rate of interest was not "a matter of evidence" (covered by the statement of oath of the plaintiff) and that he (the learned Judge) was not "prepared to interfere" with the decision of the Subordinate Judge that the rate of interest should be reduced to 24 per cent.

Against the above decision, the present Letters Patent Appeal has been filed. We agree with the learned Judge of

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this Court that the plaintiff's first contention (that the defendant is precluded, by his agreement to be bound by the plaintiff's statement on oath as to the facts, from contending that the rate of interest provided in the bond is penal) cannot be supported.

The sole remaining question is, whether the court has power to reduce the exorbitant interest provided for in Exhibit A, that is, whether such a provision is in the nature of a penalty. The Indian law on this point is found in section 74 of the Contract Act, IX of 1872 (as amended by Act VI of 1899), which gives the courts power to relieve against penal provisions and to give only reasonable compensation for the breach of a contract containing "stipulations by way of penalty." The new explanation to the section, introduced by Act VI of 1899, says: "A stipulation for increased interest from the date of default may be a stipulation by way of penalty." The new illustration (*d*) is as follows :—

"*A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the court considers reasonable."

It will be seen that while the new explanation says that a stipulation for increased interest from date of default *may be* a stipulation by way of penalty, the new illustration (*d*) says that if the increased interest is so high as 75 per cent the provision "is a stipulation by way of penalty" and not merely "*may be*" such a stipulation.

The appellant's vakil, however, relies on the case in *Sankaranarayana Vadhyar* v *Sankaranarayana Ayyar*(1) and I must admit that it does support his contention. He also relied on *Chinna Venkatasami* v. *Pedda Kondiah*(2) and *Periasami Thalavar* v. *Subramanian Asari*(3) and several cases decided by other High Courts. I intend to refer only to a few of the decisions on this point. In the case in *Chinna Venkatasami* v *Pedda Kondiah*(2) the learned Judges proceeded mainly on the ground that as the interest on default was only 12 per cent per

(1) (1902) I.L.R., 25 Mad., 343 at p. 347. (2) (1903) I.L.R., 26 Mad., 415
(3) (1904) 14 M.L.J., 136 at p. 138.

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annum, the rate of interest was not "unreasonable as the measure of compensation" and ought to be allowed to the plaintiff. The judgment in *Periasami Thalavar* v. *Subramanian Asari*(1) is very short and does not carry us further than the case in *Sankaranarayana Vadhyar* v. *Sankaranarayna Ayyar*(2).

In the case in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(2), the learned Chief Justice says that, where "the stipulation was not for *increased interest on default, but for interest on default*" (no interest being provided for in the contract till date of default), "the new explanation and the new illustration to section 74 of the Contract Act do not apply and hence the stipulation is not a penal stipulation." Mr. Justice DAVIES agreed with the learned Chief Justice and went further in his observations, which almost amount to a criticism of the policy of the Legislature in introducing the new illustration (*d*). Now the new illustration (*d*) clearly implies that even though "persons make an engagement with their eyes open" to pay 75 per cent. interest *per annum* as increased interest, the stipulation *is* one by way of penalty and the courts should hold that the parties *are not* "bound by it." But the learned Judge holds that "when persons make an engagement with their eyes open, they should be bound by it; and that "when the intention of the parties is plain and unmistakeable" "that intention must be given effect to."

With the greatest deference to the decision in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(2) I find myself unable to agree with it, as, in my opinion, it is opposed not only to the policy and intention of the legislature, but to the plain meaning itself of the words of section 74 of the Contract Act. Whether it is necessary or advisable to interfere with contracts between private persons as to the rate of interest is a question on which there has been much conflict of opinion among wise men. The wisdom of the ancients (including Manu, Solon and Plato) and of religious lawgivers, whose knowledge of human nature and human requirements was by no means despicable, supports the opinion that some restrictions should be laid on bargains for interest. I do not, of course, say that it is proper to revive the

(1) (1904) 14 M.L.J., 186 at p. 188.
(2) (1902) I.L.R., 25 Mad., 343 at p. 347.

letter of the old religious and social rules by which a Jew was forbidden to obtain interest on loans advanced to Jews (Exodus Ch. 22, verse 25), or by which a Christian was forbidden to receive interest on loans to Christians, and a Roman citizen on loans to Romans, or a Mussalman to claim interest from anybody. I only wish to point out that all nations at all times (except in quite modern days) did not leave the rate of interest on loans to be determined in the open market according to the law of supply and demand. That interest was ordinarily never to exceed the principal was enacted both by Manu and by Justinian's Code, and the law of Damdupat is still enforced in some classes of cases in the Bombay Presidency. Till 1854, laws to regulate the rate of interest allowable to creditors were in force in England. But the opinions of Bentham (an extreme doctrinaire who carried many doctrines to their logical conclusions without regard to human sentiment or the practical needs and limitations of humanity) had prevailed meanwhile in the community and the more extreme individualists known as the Manchester School of economists had become powerful; John Stuart Mill who was considered almost infallible supported the opinions of that School and all Usury laws were wholly repealed in England in 1854, *even against the protest of learned Judges like Mr. Justice* BYLES and notwithstanding the bitter experience of Austria, which repealed such laws in 1787 but on finding the consequences to be disastrous had to re-impose the old restrictions in and from 1803. A similar enactment was passed in 1855 in India.

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In England, the disastrous consequences of the wholesale repeal of the Usary laws were minimised to some extent by the action of the Courts of Equity, which interfered with the so-called freedom of contracts in the case of expectant heirs and of other young inexperienced men But the action of the Courts of Equity was found to be insufficient to extenuate or even check sufficiently the gross and serious evils of usurious and extortionate bargains, because even Judges of the Courts of Equity became more and more afraid to go against the fashionable doctrine of the benefits of absolute freedom of contract wholly unfettered by the discretion and common sense of the Judges who preside over Courts of Justice. And the evils, as might be expected, grew more and more rampant, evils, described thus by Mr. Justice BYLES in his book on Usury written in 1845. "In

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every Court of Common Law, the most cruel actions are constantly brought to enforce these extortionate demands, actions in which the law, so far from being, as she ought to be, the handmaid of justice, is in reality prostituted and made an accomplice in the perpetration of the most iniquitous gambling and robbery." About the end of the 19th century the evil of unrestricted freedom of loan contracts called for serious notice. The common sense view began to gain ground that whatever may be the theory, the two parties to loan transactions are really in many cases not "on level ground," that one of them "has necessarily and usually an unfair advantage over the other." In 1897 a Select Committee of the House of Commons inquired into the matter and the Committee was of the opinion (among others) that "the only effective remedy lay in giving to the courts absolute and unfettered discretion in dealing with loan transactions." They recommended (see their report of *1898) that any Judge or Master of the High Court or Judge or* Registrar or any Court can declare "the rate of interest excessive and substitute a lower rate of interest" The Courts of Equity had by precedent specified and almost limited "the circumstances which would justify interference," with loan contracts. Even equity jurisprudence became "crystallised" and void of elasticity. The Committee therefore thought "that it would not be expedient to attempt" in the act of Parliament recommended to be passed by the Committee "to define the cases which should constitute unfair dealings, and that the High Court and county courts should be given extended powers to deal with all such cases." The Committee fortified themselves with the opinions of "a large number of Indian Judges and high officials in India" who had been consulted by the India Government on the subject of usury. A Money-lenders' Act was passed in 1900 imposing some restrictions and giving power to courts to reduce excessive interest. But some learned *Judges showed themselves 'opposed in toto to the policy'* of that Money-lending Act and the said Judges have tried to minimise the beneficial effects of the Act as far as possible, using the old familiar argument, that, "if persons make bad bargains, they have only themselves to thank and they must put up with the consequences and ought not to expect the courts to remake their agreements for them." While the Money-lenders

Act allowed courts full discretion to relieve against excessive and extortionate and harsh or unconscionable rates of interest a learned Judge (Mr. Justice RIDLEY) deliberately confined the power to cases in which the Courts of Equity would have given relief and thus rendered the Act 'almost wholly nugatory' by his decision in *Wilton & Co.* v. *Osborn*(1) in which he carried the principle of *ejusdem generis* to an extraordinary length. Mr. Justice CHANNELL followed this narrow interpretation in 1902 (*Barnett* v. *Corunna*(2)—Bellot on Bargains with Money-lenders, p. 139). But in *In re a Debtor*(3), the Court of Appeal criticised Mr. Justice RIDLEY's view as unduly narrowing the scope of the Act. I shall quote two sentences from two of the judgments. "The words 'harsh and unconscionable' ought not to receive a limited or artificial meaning by reference to the rules of equity before the Act. In my opinion, a transaction may be 'harsh and unconscionable', and relief may be given under the Act, even if the transaction is not one in respect of which a Court of Equity would have given relief before the Act." "The court must, in my opinion, be satisfied that the rate of interest charged is excessive . . . . and . . . the transaction is harsh and unconscionable. I should be sorry to say that the rate of interest charged . . . might not be so excessive as, *for that reason alone*, to render the transaction harsh and unconscionable." But again the effect of the case of 1903 [*In re a Debtor*(3)] was sought to be counteracted by later decisions (I do not mean to cite them) in which other English Judges in 1903 to 1905 thought that the excessive nature alone of the rate of interest should not be held to be any proof of the harshness or unconscionable nature of the bargain Again the Court of Appeal had, in 1905, to lay down the correct principles. The matter was at last set at rest by the decision of the House of Lords in 1906 in the case of *Samuel* v. *Newbold*(4). I shall refer to this case later on

Now the case in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(5) was decided in 1901, evidently under the influence of the trend of English decisions before 1903. Under the influence of those technical decisions, the Indian High

(1) (1901) 2 K B 110
(2) (1901) 2 K B, 264.
(3) (1903) 1 K B, 705
(4) (1906) A C, 461
(5) (1902) I L R, 25 Mad, 343 at p 347.

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Court had narrowed the beneficent provision of section 74 of the Contract Act and instead of giving the ordinary common sense meaning to the word 'penalty' when used in relation to contracts, *viz.*, a liability agreed to by the parties to be imposed as a vindictive punishment on the party committing the breach of contract and not merely as reasonable and even liberal compensation to the other side injured by the breach of contract, the Indian Court said (following the English cases) that even if a harsh and excessive rate of interest is provided for to be enforced from date of default, it should not be treated as a penalty. Of course, it amounted to an apotheosis of the precedents established by courts foreign to India. The legislature, after long delay, thought fit to intervene and introduced in 1899 the new explanation and the four new illustrations (*d*) to (*g*) to indicate that courts should not take a narrow view of the meaning of the word 'penalty' based on English precedents, but might hold provisions for excessive interest to take effect even from date of default only to be a provision by way of penalty. The explanation (*d*) surely was not intended to, and does not, mean that, unless some interest was provided for till date of default, exorbitant interest after default should not be treated as a penalty, but it merely explained and indicated the intention of the legislature that the narrow view till then held as to the construction of the word 'penalty' should not be taken thereafter. Further, by introducing the new illustrations (*d*) to (*g*), it showed (especially by illustration (*g*) that every provision in a contract which was intended to impose a harsh punishment on the defaulting party beyond what was needed to give a reasonably liberal compensation to the other party *should* be treated as a penalty. An explanation and an illustration should not, of course, be taken as *restricting* the plain and natural meaning of the body of the section but as indicative of the beneficent principle which the legislature wanted the courts to follow.

The Contract Act does not make any distinction between money-lenders and other obligees but has enacted a comprehensive provision to apply to all contracts containing harsh and unconscionable provisions in the nature of penalties. The High Courts in India were inclined sometimes to follow the English cases decided before 1903, that is, the principles of the extreme Manchester School of Economists and at other times to take a

more extended view of their powers under section 74 of the Contract Act. In *Bansidhar* v. *Bu Ali Khan*(1), a Full Bench of four Judges unanimously held that a provision for exorbitant interest at 1 Re. *per diem* on Rs 50 on default from date of default, *there being no interest payable till the due date if the principal is repaid on the due date*, is a provision by way of penalty. In the language used by ordinary men, the provision is clearly "of a highly penal character" and "a penalty of a very outrageous kind," the condition as to interest by its very enormity writes itself down not only as a penalty but as a penalty of the most impudent and shameless character. (I have taken the strong expressions under quotation from the judgment of STUART, C J, STRAIGHT, J., said in that case *Bansidhar* v. *Bu Ali Khan*(1) (for himself and two of his colleagues) that if courts are always bound by the agreement between parties as to interest "it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of 'interest' might not be carried In a country like this, where there is so much borrowing by the ignorant lower classes, who as much require to be *protected against themselves* as against the money-lenders, a too literal application of the above provision could only be productive of oppression and injustice of the most grievous kind" The learned Judge proceeded to say that no "Court of Equity would allow itself to be made the medium to enforce terms so monstrous" and that the provision must be treated as a penalty, as the rate provided for as interest is "as interest, an extortionate amount, for which no adequate consideration is shown, and which no man would contract absolutely to pay." I think that the view taken in this Full Bench case in *Bansidhar* v. *Bu Ali Khan*(1), is clearly more in consonance with the intention of the legislature than the contrary view taken in other courts. Instead of putting to themselves the simple question whether, in the view of ordinary reasonable men of the world, a high rate of interest provided for in a particular contract as payable on breach of that contract must be taken as intended to secure prompt payment on the due date (or, it may be, was inserted through grasping greed on one side and careless improvidence on the other) and *not* as the measure of reasonable compensation for such breach, several cases were

(1) (1881) I L R., 3 All., 260

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decided in India (following the English cases) in which fine distinctions were drawn between stipulations for high interest from date of bond and from date of default, and hence the Amendment Act, VI of 1899, introduced a new explanation and as many illustrations (*d*) to (*g*) to indicate the view of the legislature as to the courts having unnecessarily narrowed their own powers to give relief. The new illustration (*f*) says that where money was payable in instalments (*without any provision for interest*) but on default the whole is made payable at once (without again any provision for interest), the provision for prompt payment is not in the nature of a penalty. This is quite reasonable as the creditor's mercifulness in allowing the debt to be paid by instalments may be properly withdrawn when default is made. But the other three new illustrations all indicate that the courts should be liberal in construing the word "penalty" so as to include *all* bargains which are clearly and on a *primâ facie* view harsh to the debtor.

The Indian Legislature came in, in 1899 (after the report of the House of Commons Commission), with these amending provisions to the Contract Act, adding the explanation and four new illustrations clearly showing that they adopted the principle of the Allahabad decisions in preference to the views of the other High Courts.

But even if the English decisions have taken a narrow view of the powers of Judges to interfere with harsh contracts (I hope to show that the most authoritative English decision of 1906—*Samuel* v. *Newbold*(1)—has overruled the earlier decisions taking such narrow views), are we in India bound to follow the conservative tendencies of English Judges in these matters and to counteract and try to whittle away the beneficial provisions enacted by the legislature, which with practical common sense had come to the opinion that where the increased rate of interest is on its face exorbitant (like a rate of 75 per cent.) it should be treated as a penalty and the courts should be given discretion to reduce that rate to a reasonable one? If English Judges think that in England, where the percentage of literacy among the population is very high, contracts should be enforced according to their terms, though the rate of interest is harshly excessive, should

(1) (1906) A.C., 461.

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their views be followed in India where about 94 per cent. of the population is illiterate? It seems to me to be a cruel joke to talk of the ordinary borrowing public or the public making investments on a small scale in chits in India as able to deal at arm's length with the sharp wits of company promoters, chit-proprietors and money-lenders. In this connection, the conviction of several company promoters who have been gulling the illiterate and improvident public may be recalled to our minds. Even in England, the legislature has felt itself compelled to pass Factory Acts, Workmen's Compensation Acts, Acts against the sweating of labourers and even a Minimum Wage Act. In India, the Deccan Agriculturists' Relief Act, the Punjab Land Alienation Act and the several Tenancy Acts protect the ordinary population against their own illiteracy and improvidence. A large percentage of the illiterate population is almost in the position of children who should be protected in some matters against themselves by the State and by the Legislature. "The exploitation of the necessitous, the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality as well as to public policy."

Such remedial enactments, passed in order to promote individual morality and public policy, should be liberally construed in order to promote such public policy (see the well-known cases of enactments giving powers to municipalities and public bodies in the interests of public health and welfare). I hold "strongly the view that the usurer is a social and economic pest, serving no useful purpose whatever, that he should be discouraged and not allowed to take advantage of obtaining higher rates of interest *even from willing borrowers of full age and understanding*. It is contrary to the public weal that persons should be encouraged to agree to pay extortionate rates of interest. Under German law such a contract would be declared void as an exploitation of the careless improvidence of the borrower and, in addition, the lender would have been sentenced to six months' imprisonment and to a fine of £150. Such stringent measures may be unnecessary," but the amended section 74 of the Contract Act "should at least be administered according to the intention of the legislature" especially in India (see Bellot on Bargains with Money-lenders, page 101). The Hindu Shastras have

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generally prohibited excessive interest running beyond the principal, the Muhammadan lawgivers have prohibited the taking of interest altogether and the British Indian Government has been trying to enact numerous provisions to protect ignorant and improvident people against the consequences of their own ignorance and improvidence. Of course, if we are inclined to hold with Bentham and Turgot, that all religions and all rules whose origin might be traced to Hindu, Christian or Muhammadan religious literature are so much superstitious trash which cannot contain an iota of wisdom and should be thrown to the scrap heap, and that men of all classes and in any part of the world must be presumed to be "equal" and equally provident and clever, and that a person's agreeing to pay an absurdly high interest on default of fulfilling an ordinary contract should not be treated as presumptive evidence of his improvidence and that all historical continuity in the evolution of human law and human society is useless and must be superseded by doctrinaire utilitarian logic, I have nothing more to say. But I venture to hold that that is not the opinion of the Indian legislature and that it is not the trend of modern enlightened opinion.

I shall now turn to the most authoritative English ruling on the provisions in the Money Lenders' Act of 1900, which provisions are much less favourable to the debtor. I refer to the case of *Samuel* v. *Newbold* (1), already referred to. The judgments of the Lords were pronounced after full consideration (of about a month's duration) of the elaborate arguments of able counsel. I shall quote pretty largely from the judgments as I feel that my own language can never be as clear and terse as that of those eminent Judges. Lord LOREBURN (Lord Chancellor) says:—

"*In my opinion this contention cannot be maintained, nor* ought a Court of Law to be alert in placing a restricted construction upon the language of a remedial Act. The section means exactly what it says, namely, that if there is evidence which satisfies the court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the court may re-open it, provided, of course, that the case meets the other condition required. A transaction may fall within this description in many ways. It may do so

(1) (1906) A.C., 461.

because of the borrower's extreme necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. *These are only illustrations*, and, as in the case of fraud, *it is neither practicable nor expedient to attempt any exhaustive definition.* What the court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and *according to its sense of justice* the transaction was harsh and unconscionable. *We are asked to say that an excessive rate of interest could not be of itself evidence that it was so.* I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained If no justification be established the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the court to prevent oppression, leaving it in the discretion of the court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power"

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Lord MACNAGHTEN said that the Money Lenders' Act "involves a new departure in principle" and that the limitations and restrictions which the Courts of Chancery imposed on themselves in relieving against harsh bargains were no longer applicable "The question which it is said this appeal was brought to determine is whether the view of RIDLEY, J., or the view of the Court of Appeal was right. RIDLEY, J., with whom CHANNEL, J., seems to have agreed, thought that the relief which the Act extends to a borrower must be limited to those cases in which, before the Act, the Court of Chancery would have given relief, and that the only standard to be applied under section 1 is that adopted by the Courts of Equity before the Act Speaking for myself, I must say that, while listening with great interest to the exhaustive exposition addressed to the House by the learned counsel for the appellants, I could not help thinking what a mockery it would be if that were all the Act has done; what an intolerable strain would be thrown upon inferior Courts unfamiliar with the doctrines and practice of Courts of Equity, if they were privileged or condemned to listen to lengthy arguments and venerable precedents before deciding a question *that any man of common sense is just as capable of deciding as the most learned judge in the land, provided he is not hampered by authorities, which require no little training to discriminate and*

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by earlier English precedents, the weight of which pressed so heavily on the minds of learned Judges like RIDLEY and CHANNEL, JJ., that they thought themselves obliged to restrict even the amending, amplifying and remedial provisions of the Statute of 1900 to the confined area of the old precedents). I think that in view of the opinions expressed in this House of Lords case of 1906—*Samuel* v. *Newbold*(1)—the weight of the Judgments of the Indian High Courts [including that in, *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(2)], which followed the English precedents and the old Benthamite notions as to the untouchable and sacrosanct character of contracts, however harsh and unconscionable they might *primâ facie* appear, cannot be such as to preclude their reconsideration, if necessary, by a Full Bench.

Lastly, let me assume for the sake of argument, that the amended section 74 of the Contract Act should be construed with the utmost and most literal stringency. Even then, I fail to find any warrant for the view that, though an increase of the rate of interest from 12 per cent. to 75 per cent. should be considered as a penalty, as is clearly shown by the new illustration (*d*) an increase from zero per cent. (or even a minus rate) to plus 100 per cent should not be so construed. Mathematically and literally *there is an increase of rate in both cases and hence, even under* the strictest construction of the section, the court is bound to treat an unconscionably high rate of interest after default whether the interest before default is zero or any other arithmetical notation, as a penalty. In this connection, illustration (*g*) to section 74 is instructive. There is no provision for interest in the bond referred to in the illustration, there is no new explanation added to the section which covers that case and yet, the Legislature has indicated that because the bond provided for payment of a larger sum than was lent, though the payment was to be made by instalments, the provision as to the whole sum being payable on default of one instalment is a penal provision and can be relieved against. The Legislature has thus clearly shown that the word "penalty" should not at all be construed narrowly or technically. I might again repeat that the new illustration (*d*) clearly treats the rate of interest of 75 per cent. as a penalty *solely on account of its excessive character* and does not

(1) (1906) A.C. 461. (2) (1902) I.L.R., 25 Mad., 343 at p. 347.

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say that the court is merely at liberty under certain circumstances or if certain facts as to the relative positions of the debtor and creditor are proved to treat the provisions as a penalty to be relieved against. I would, therefore, dismiss the Letters Patent Appeal with costs, but as there is the reported Division Bench ruling in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(1), against my view, I would refer the following question to a Full Bench .—

Whether, when no interest would have been payable under a contract except in case of default, but an excessive rate of interest is provided for on default, whether under such circumstances the court is empowered to treat the stipulation for such excessive rate of interest as a penal provision and whether the court is at liberty to award reasonable compensation in lieu of such excessive interest.

This Letters Patent Appeal again came on for hearing and having stood over for consideration, the court expressed the following opinion :—

WALLIS, J.—The question referred to us is whether, when no interest is payable until default, but interest at an exorbitant rate is payable as from the date of default, the latter stipulation can be treated as one by way of penalty, within the meaning of section 74 of the Indian Contract Act as amended. This question was answered in the negative in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(1) and there are decisions to the same effect for which no reasons are given in *Chinna Venkatasami* v. *Pedda Kondiah*(2), and *Periasami Thalavar* v. *Subramanian Asari*(3). There are, however, earlier decisions of other Indian Courts given without reference to the provisions of section 74 which point the other way, as also a recent decision in *Ganapathi Pillai* v. *Sundara Teran*(4), in which a stipulation in a chit fund apparently like this was held penal; and in consequence of the order of reference to a Full Bench it has now become necessary to reconsider the question. As it appears to me that sufficient attention has not always been paid to the light thrown upon this and similar questions by a consideration of the scope and object of section 74 as it originally stood, and of the

(1) (1902) I.L.R., 25 Mad., 343 at p. 347. (2) (1913) I.L.R., 26 Mad., 445.
(3) (1904) 14 M.L.J., 130 (4) (1912) 22 M.L.J., 154.

modifications introduced in 1889, I propose to deal, in the first place, with this aspect of the case. When enacting the Contract Act in 1872, the Legislature had to decide whether provisions of a penal character were to be enforced according to their terms. The dominant view then and later was against interference with the terms of the contract, but it was the practice of Courts of Law and Equity in England, based on decisions and legislation dating from times when other views of expediency prevailed, not to enforce stipulations for penalties, whilst enforcing stipulations for liquidated damages. The decisions as to the distinction which are collected in the notes in *Sloman* v. *Walter*(1), had not, as observed by RIGBY, L J., in one of the most recent cases, *Willson* v. *Love*(2), even then laid down any very clear rule by which to determine in cases of the kind whether the sum made payable was a penalty or liquidated damages. See also *Wallis* v. *Smith*(3), *General Credit and Discount Company* v. *Glegg*(4) and *Lord Elphinstone* v *Monkland Iron and Coal Co.*(5). In the opinion of the learned Lord Justice, as in that of Sir GEORGE JESSEL in *Wallis* v. *Smith*(3), the Courts had made a mistake when they departed from the general rule that effect ought to be given to the terms of the agreement entered into between the parties, and, when once that rule was departed from, it became extremely difficult to arrive at any clear rule on the subject. In India the effect of the Act XXVIII of 1855 as to the payment of interest was to make some of the courts including our own in some instances enforce stipulations which in England would undoubtedly have been considered penal. In this state of things we find that the Indian Legislature, whilst rejecting the distinction between penalty and liquidated damages as inapplicable to India, declined to follow the influential body of opinion which would then have made all penal provisions enforceable according to the terms of the contract, and provided in section 74 of the Indian Contract Act that even stipulations which in England would be regarded as stipulations for liquidated damages and so enforceable according to their terms might in effect be treated as penal and relieved against—in all cases in which a sum was named in the contract as the amount to be paid in case of breach. When Courts of Equity declined to enforce a penal stipulation it was the practice to

(1) 2 White and Tudor's Leading Cases, 204.
(2) (1896) 1 Q B., 626
(3) (1882) 21 Ch. D., 243
(4) (1883) 22 Ch D., 549
(5) (1886) L.R., 11 A.C., 332.

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send the issue *quantum indemnificatus*, which may be translated, "what is the reasonable amount of damages?", to be tried at common law, and then give judgment for that amount; and under section 74 this is what the court has to find and to allow where it is less than the sum stipulated for. In thus enabling stipulations for liquidated damages falling within the terms of the section to be treated as penal, the Legislature went much further in the way of interfering with contracts than the English courts had ever gone, and in construing the section in its original form, and as amended, it appears to me, with great deference, that the *dicta* of eminent Judges both before and since as to the inexpediency of interfering with the terms of the contract in cases of the kind afford very little assistance as to the scope of the section, because the Legislature has shown that it does not agree with this point of view.

The result of numerous decisions upon the section as it originally stood was that, in the opinion of some High Courts including our own, stipulations for enhanced interest from the date of the bond came within the section as cases in which a sum was named in the contract to be paid in the event of breach; and that, in the opinion of all the High Courts, stipulations for enhanced interest from the date of default did not come within it. This was expressed in some cases such as *Mackintosh* v. *Crow*(1) by saying that the former were penal and the latter not virtually treating the section as containing a statutory definition of the word penal. In *Nanjappa* v. *Nanjappa*(2) in a passage on which the learned Chief Justice relies in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(3) the learned Judges no doubt go further and observe with regard to a stipulation for enhanced interest from the date of default that "in such an agreement no question of penalty arises because it imposes an obligation on the debtor to pay a larger sum than was originally due," whereas they hold stipulations for enhanced interest from the date of the bond to the penal "because the debtor does on default immediately become liable for a larger sum." If these observations are to be regarded as more than a decision that the latter class of stipulations falls within section 74 as it orginally stood, I am, with the greatest respect, unable to agree with them, as it appears to me to be perfectly

(1) (1883) I.L.R., 9 Calc., 689 (2) (1889) I.L.R., 12 Mad., 161 at p. 166.
(3) (1902) I.L.R., 25 Mad., 343 at p. 347.

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well settled by the decided cases in England that stipulations for enhanced interest on default are, or at least may be, penal when the enhanced rate runs from the date of default. I make the reservation in consequence of what SARGENT C.J., said in *Umarkhán* v. *Salekhán*(1). In the notes to *Sloman* v *Walter*(2) it is said that the ordinary rule in mortgages is that a proviso for increasing the rate of interest on non-punctual payments is not allowed as being penal, citing *Powis* v. *Maynard*(3) and other cases, see also the judgment of PONTIFEX, J. in *Bichook Nath Panday* v. *Ram Lochun Singh*(4). No doubt there is the early decision of this Court in *Arulu Mastry* v. *Wakuthu Chinnayan*(5) that enhanced interest from the date of default was not penal, but it appears from the report that the case was not argued and the English cases are not referred to.

It seems to me well established by the English authorities that such stipulations are penal though they did not fall within section 74 as originally enacted, and I think that this was the view taken by the Legislature when it amended the section by introducing the words "or if the contract contains any other stipulations by way of penalty" and added an explanation dealing with this very stipulation Two observations arise on this amendment. The use of the word "other" shows that the Legislature uses the word penal in a very wide sense and so as to include stipulations falling within the earlier part of the section for liquidated damages, which according to the English decisions are not penal. In the original section it treated such stipulations as penal and now it expressly includes them among penal stipulations. See also the marginal note. When by the very terms of the section we are required to treat as penal stipulations for liquidated damages which provide for more than reasonable compensation, it would, I think, be very strange if stipulations, such as those with which we are now dealing, were not to be considered penal within the meaning of the section. Secondly, as regards stipulations for increased interest from the date of default, which, according to the English decisions, were penal, it appears to me they fall within the words "any other stipulation

(1) (1893) I.L.R., 17 Bom., 106.
(2) 2 White and Tudor's Leading Cases in Equity, 264 at p. 266.
(3) (1747) 3 Atk 519.
(4) (1873) 11 Beng. L.R., 135.
(5) (1864) 2 M.H.C. R. 205.

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by way of penalty," and that no explanation was necessary to effect this, although it may have been desirable to insert one owing to the expressions used in some of the cases already referred to. Then contrasting the words "may be" in the explanation with the word "is" in illustration (d) which deals with a case of enhanced interest at 75 per cent. from the date of the default, full effect may, I think, be given to the section by treating such stipulations as penal where they provide for more than the 'reasonable compensation' referred to in the body of the section.

Coming now to the decision in *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(1) the learned Chief Justice considers that the amendments in the body of the section were merely verbal, and that the explanation provided that a stipulation for enhanced interest from the date of default might be a stipulation by way of penalty whereas previously it could not. If a stipulation for enhanced interest from date of default was not penal but for the explanation, neither, he concluded, was a stipulation for interest to begin to run from the date of default even at an exorbitant rate; and, therefore, as the explanation does not apply to it, such a stipulation, as I understand *him*, does not come within the section at all. On this last point DAVIES, J, concurred. With great respect, this view appears to me not to give sufficient effect to the amendment, which brought within the section all stipulations by way of penalty which were not already covered by it. As I have already pointed out, the Legislature began by treating as penal a large class of stipulations which had not till then been treated as penal either in England or in India including stipulations for liquidated damages, and it subsequently gave completeness to the section by bringing all other stipulations by way of penalty within it. It now amounts to a definition of penalty, including in that term all stipulations that were theretofore recognized as penal and stipulations for liquidated damages as well; and the only inference I can draw from this is that it is the general policy of the Legislature that stipulations of the kind should not be enforceable in so far as they provide for more than reasonable compensation, and that we ought not to construe the word penalty narrowly or to be astute in finding reasons to take the case out of the section.

(1) (1902) I.L.R., 25 Mad., 343.

As regards stipulations such as the present, there are three decisions—*Motoji bin Ratnaji* v. *Sheik Husen* (1), *Para* v. *Govind*(2)—, and *Bansidhar* v. *Bu Ali Khan* (3)—two before, and one after, the passing of the Contract Act, that apart altogether from the provisions of the section they are penal. A stipulation for enhanced interest from the date of the bond is one of the "other stipulations by way of penalty" now included by the amendment, and I see no reason why the present stipulation should not be another. Illustration (d) says that a stipulation for 75 per cent. on default is a penalty where interests at 12 per cent. was payable from the first. There appears to me to be no substantial difference where, as in the case referred to us, no interest at all is payable until default. In either case there is a stipulation on default in payment of the sum of money originally stipulated for, that the debtor should be liable to pay a further sum by way of interest at an exorbitant rate from the date of default, and that appears to me to be sufficient to make the stipulation penal in the very wide sense in which I think the word is used in the section. I would answer the question in the affirmative I do not decide whether the stipulation in the present case for interest at 180 per cent. on default should be considered penal—not that I have any doubt about it—but because it is not raised in the reference.

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SUNDARA AYYAR, J.—I agree in the conclusion arrived at by my learned brother, WALLIS, J., but as the case is one of considerable importance I consider it desirable to state briefly the reasons which have induced me to do so.

The answer to the question referred to the Full Bench depends on the construction of section 74 of the Indian Contract Act, (IX of 1872) as modified by section 4 of Act VI of 1899. Section 73 of the Act lays down the general rule to be applied in suits for damages for breach of contract. The party who suffers by the breach is entitled to receive "compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach." That rule is explained and qualified by the provisions of section 74. This section relates to two classes of cases, first, cases where "a sum is named in the contract as the amount to be paid in case of such breach" and secondly,

(1) (1863) 6 Bom H.C.R. (A.C.J.), 8. (2)(1873) 10 Bom. H.C.R. 382.
(3) (1884) I.L.R. 3 All., 260.

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where the contract contains "any other stipulation by way of penalty." In either case the party complaining of the breach is entitled to receive from the party who has broken the contract "reasonable compensation not exceeding the amount so named," or, as the case may be, "the penalty stipulated therefor." Before the amendment in 1899 provision was made only for the first of these two classes. The word 'penalty' was not used in the section as it originally stood. No definition is given in the Act of the word 'penalty.' An explanation has been added the object of which is only to show that a particular stipulation may be one by way of penalty, namely, a provision for increased interest from the date of default. Some illustrations have been added to throw light on the meaning of the word. The word is apparently borrowed from the English law where it has had a long history. The section, as it originally stood, enacted a part of the law administered in English Courts. It is desirable, therefore, to note the English law bearing on the subject.

It was usual in England from a very early time to draw bonds in a manner which is not common in this country. The executant or obligor acknowledged himself to be bound or indebted to another in a certain sum of money. A bond containing such an acknowledgment and no more was called a single bond, but a condition was usually appended, that upon the performance of a certain act the bond should be void, but otherwise to remain in full force, and it was then called a bond with a condition. The debt acknowledged was fixed at a larger sum than the equivalent of the condition, generally at twice the amount, for the purpose of securing its performance. This sum was called the penal sum or penalty, the penalty being forfeited on non-performance of the condition. The bond might of course be adapted to secure any other matter than the payment of money, such as the performance of the covenants in a deed, the faithful discharge of an office or the rendering of accounts, upon the satisfaction of which the bond might be declared to be void. Such bonds were called bonds with special conditions. By the common law the whole penalty became forfeited and was recoverable upon breach of the condition, that being the result of the apparent language of the instrument. But the courts of equity relieved against the forfeiture at law upon payment of the amount really due or the damages actually arising

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from the breach of the obligation. The true reason for relief, no doubt, was that it would be inequitable to enforce a provision for payment of an amount far in excess of the damage really sustained by the breach of the condition in the bond, the condition being the real covenant which the promiser agreed to perform. But the court considered it undesirable to state expressly that it was at liberty to set aside the contract between the parties as to the sum which the breaker of the contract should pay to the promisee. The jurisdiction was therefore exercised by professing to interpret the contract between the parties and by holding that they really did not intend what was expressly stated in the bond to be their intention. The power of granting similar relief was given to the common law courts by special statutes, the principal of them being 4 and 5, Anne c 16, s. 12, which applied to cases of non-payment of money *ad diem* according to the condition, and 8 and 9 Will. III. c. 11, which applied "in all actions . upon any bond . . . or on any penal sum, for non-performance of any covenants or agreements in any ., deed, or writing contained." The statutes restricted the amount recoverable to damages for the breaches of the conditions or agreements which the plaintiff was bound to assign and prove The judgment for the penalty was to remain only as a security against further breaches A bond with a condition was held to bind the obligor to perform the condition just as if he had entered into a covenant in similar terms. Courts of equity also exercised the jurisdiction conferred by the statute of William III where the condition did not relate to the payment of money but to other matters When a sum *in solido* was fixed by the parties and agreed to be paid by the one to the other for breach of contract it was not necessarily treated as a penalty under the statute of William III, but the Courts treated it either as penalty or as liquidated or settled damages the payment of which would be enforced as such. There was much conflict in the decided cases as to the rules which should govern the settlement of this question. They all proceeded on artificial canons for the purpose of arriving at what was to be taken to be the intention of the parties, but really intended to decide whether, in the judgment of the Court as to what should be regarded as reasonable damages to be awarded to the promisee, the amount fixed in the contract should be enforced or whether it should be set aside. It is unnecessary for the purposes of this judgment to enter upon a discussion

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of these rules. They were elaborately considered in *Wallis* v. *Smith*(1) As the real test was whether the Court considered the stipulated amount a reasonable and proper measure of the damages sustained by the promisee, the principles adopted varied *according to the economical and social opinions* of particular Judges. JESSEL, M. R. was much against interfering with the stipulations of parties. He said "Courts of Law should maintain the performance of contracts according to the intention of the parties; they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character." The exceptions referred to by his Lordship were the old Usury Law, the Factory Acts, the Mines Regulations Acts and so on. Lord Justice COTTON was of the same opinion. In cases, however, where the contract related to the payment of a sum of money, an agreement to pay a larger sum upon breach was always considered a penalty. If the contract did not mention a definite larger amount but secured the payment of a larger amount by a provision for increased or excessive interest, then it was in the discretion of the Courts to treat the stipulation as penal or otherwise. Where a mortgage was made at a certain rate of interest with a proviso that upon default in punctual payment a higher rate shall be charged, the increase of interest was treated as a penalty, but if a certain rate of interest was fixed and the mortgagee agreed to take less if it be paid punctually that was treated as an enforceable agreement. See Leake on Contracts (4th Edition) p. 777. Where the contract provided for the payment of a debt by instalments and upon default in the payment of any of the instalments the whole of the unpaid portion of the debt with interest was to become immediately payable, it was held that the proviso was not in the nature of a penalty.—*Sterne* v *Beck*(2). No hard and fast distinction was made between cases where the increased interest agreed to was to run from the date of the bond and those where it was to run from the date of default. In the words of Lord Justice LINDLEY, "you are to ascertain the intention of the parties by what they said—that

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(1) (1882) L.R., 21 Ch. D. 243 at p. 266. (2) (1863) L.D. J. and S. 595.

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is plain enough—but you are to ascertain the intention of the parties not only by what they said but by what the Court sees to be the consequence, and by what the Court may or may not consider to be absurd or oppressive, or was thought to be so in former times. Take the common case of a money bond. It meant what it said. Take the ordinary case of a covenant to pay £5,000 if £500 was not paid by the day named, the parties meant what they said; but effect has long ceased to be given to what was intended. Whether the relief was given on the theory of oppression, or on the theory that the parties could not have meant what they said—that it was too absurd—or whether relief was given by reason of the Usury Laws, I do not know—it is an antiquarian research which I have not prosecuted. But it has long been settled that where a person agrees to pay a larger sum if he does not pay a smaller one, he does not mean what he says, and the contract is not to have the effect that one would suppose it was intended to have" See *Wallis* v. *Smith*(1). In *General Credit and Discount Company* v. *Glegg*(2), BACON, V. C. made a distinction between a case where the agreement is to pay increased interest and one where it is to pay a commission in the case of failure to pay in time. He held that the latter case did not come within the principle of *Wallis* v. *Smith*(1). He regarded the promise to pay commission as intended to protect the lenders against a state of things which might possibly arise, namely, that it might suit the convenience of the promiser, who was a contractor, instead of paying the money to the lenders to lend it at interest which might be very high. In effect he regarded the contract in that case as consisting of alternative promises, either to pay the sum stipulated with interest at the date agreed upon or to pay at a future time with interest and commission. Any statement in the contract that the stipulation was to be regarded as penalty or liquidated damages was considered immaterial, although in *Wilson* v. *Love*(3) the Court of Appeal held that some weight should be attached to the statement of the parties that the stipulation should be regarded as a penalty. See *Lord Elphinstone* v. *Monkland Iron and Coal Company*(4). The English cases have all been collected in *Banke Behari* v. *Sundar Lal*(5) and *Umarkhán* v. *Sálekhán*(6).

(1) (1882) L.R., 21 Ch. D., 243 at p. 274.
(2) (1883) L.R., 22 Ch. D., 549.
(3) (1896) 1 Q.B., 626.
(4) (1886) L.R., 11 A.C., 332.
(5) (1893) I.L.R., 15 All., 232.
(6) (1893) I.L.R., 17 Bom., 106.

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In India also a diversity of opinion prevailed before the enactment of the Contract Act, due in reality to difference between Judges in their economical opinions. In *Adanky Ramachandra Row Garu* v. *Indukuri Appalaraju Garu*(1) HOLLOWAY, J., was strongly disinclined to allow a party to a contract to get behind his promise; and he observed that the principles of the statutes of the time of Anne and William III which were based on the unsound economical views of an earlier period should not be introduced into India. In the particular case before the learned Judge, the defendant, who had agreed to supply jaggery by a specified date and received advances, further agreed that in default he would pay interest at 1 per cent. per mensem on the advance and *nafa* at Rs. 7 per kantlam. He made no delivery of jaggery. The learned Judge treated the provision of the contract as one for liquidated damages. He treated the question as one of the intention of the parties. He observed "if, instead of providing for the payment of double the stipulated price as profit, the contract stipulated for the payment of 300 per cent. upon the advance, there can be no doubt that the Courts would have been bound to enforce it." He mentions no authority for this statement. The case was not argued for the defendant in the suit. He regarded Act XXVIII of 1855 as conclusive proof that the intention of the legislature is that parties should be left to make, and be compelled to stand by, their own bargains. In *Arulu Mastry* v *Wakuthu Chinnayan*(2), SCOTLAND, C.J., and PHILLIPS, J., held that a covenant to pay increased interest from date of default was not a penalty. The Bombay High Court on the other hand (COUCH, C.J., and NEWTON, J. held that a promise to pay an increased rate of interest was a penalty, and that the Court was bound to award only reasonable compensation. See *Rasaji* v. *Sayana*(3) and *Moto bin Ratnaji* v. *Shekh Husen*(4). In one of the two cases, increased interest was payable from the date of the bond. It does not appear whether it was so in the other case At any rate, the judgment did not make any distinction between the two classes of cases. In *Hakmi Manji* v. *Meman Ayub Hajietal*(5), an agreement to continue to pay after default interest at 12½ per cent.

(1) (1865) 2 M.H.C.R., 431.
(2) (1864) 2 M.H.C.R., 205.
(3) (1869) 6 Bom. H.C.R., 7 (A.C.J.)
(4) (1869) 6 Bom. H.C.R., 8 (A.C.J.)
(5) (1870) 7 Bom. H.C.R. 10 (O.C.J.)

per mensem, the rate originally agreed upon, was held by COUCH, C.J., not be a penalty against which the Court would relieve. The learned Judge put his decision on the ground that the agreement was not for increased interest on default in payment. The case was remitted for the trial of the question whether the rate of interest was enforceable under the Hindu Law, which was held to be applicable to the case, notwithstanding the provisions of Act XXVIII of 1855. In *Pará* v. *Govind*(1) WESTROPP, C.J., and NANABHOY HARIDAS, J., held that a promise to pay interest at 75 per cent. from date of default was a penalty. The bond contained no provision for interest until the due date The learned Judges refused to follow the decision in *Arulu Mastry* v *Wakuthu Chinnayan*(2) WESTROPP, C J, also observed that the opinions of the Judges of the Calcutta High Court were not uniform. That Court certainly acted on the view that it had the power to relieve against all provisions with regard to damages payable which the Court might regard as oppressive or unreasonable. In *Bichook Nath Panday* v. *Ram Lochun Singh*(3) the agreement was to pay in case of default increased interest from the date of the bond The stipulation was held to be a penalty. The judgment was not based on the ground that the increased interest was to commence from the date of the bond. PONTIFEX, J., considered the question at length and referred to the English case of *Sainter* v *Ferguson*(4) in support of his view. He alo relied on *Kemble* v. *Farren*(5) as showing that the court has jurisdiction in every case to disallow any agreement which would have the result of making a much larger sum payable on breach of an agreement to pay a smaller sum. The earlier cases of the Calcutta High Court are reviewed in his judgment. The conclusion he came to was; "every case of this nature must depend on its own circumstances, as stated by the late E. JACKSON, J., in the case of *Peetambur Chatterjee* v. *Kaleechurn Roy* (6)." In *Brojo Kishore Roy* v. *Madhub Pershad Misser* (7), JACKSON and MITTER, JJ., held that a stipulation to pay increased interest from date of default was not a penalty. They did not lay it down as a rule applicable to all cases and distinguished *Boley Dobey* v. *Sideswar Rao Boboo Roykur*(8) as

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(1) (1873) 10 Bom. H C R., 382.
(2) (1854) 2 M.H C R., 205
(3) (1873) 11 Beng. L. R., 135.
(4) (1849) 1 Mac. N. and G., 286
(5) (1829) 6 Bing., 141.
(6) (1873) 11 Beng., L R., 137.
(7) (1872) 17 W.R., 373 (C.R.)
(8) (1869) 4 Beng. L.R., 91 (App.)

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one where the circumstances required that the provision should be treated as a penalty. They merely held that they could not lay down as a matter of law that every provision for the payment of increased interest from date of default must be heldto be a penalty. In *Omda Khanum* v. *Brojendro Coomar Roy Chowdhry*(1), Justice MARKBY was of opinion that a stipulation for a higher rate of interest in case of breach might be regarded as a penalty and distinguished such an agreement from a mere contract to pay the principal sum with a high rate of interest. He, however, base his decision on his construction of the agreement in the particular case, that it consisted of alternative promises. He regarded the case as one in which a very heavy risk was provided for by a very heavy rate of interest. COUCH, C.J., practically took the same view of the contract. He held that the damage likely to be sustained by the plaintiff was uncertain and that therefore the agreement entered into by the parties must be enforced. The high rate of interest was payable in that case if the defendant failed to execute a conveyance of an Izara to the plaintiff; the damages likely to be sustained by the breach were decidedly of an uncertain character.

I have referred to the important cases before the enactment of Act IX of 1872. They show, I think, that the Bombay and Calcutta High Courts exercised the right to give relief in cases where an agreement between the parties regarding the damages payable to the plaintiff, whether in a lump sum or by payment of interest, was regarded as unreasonable or unjust, and in the case of stipulations for interest they examined the particular contract before them to decide whether it should be enforced, whether the provision related to interest at a high rate from the date of breach without any stipulation for interest at all till then, or to the payment of increased interest in case of default either from the date of the bond or from the date of default. The first question in every case was whether the agreement regarding damages was to be regarded as an independent alternative stipulation or an assessment by the parties of the damages to which the promisee was to be entitled. In the latter case the Court had the right to hold that, the principal contract being the right to the payment of a sum of money or the performance of an act by the promisee,

(1) (1874) 12 Beng., L.R., 451.

the secondary or subsidiary contract as to the damages to which the promisee was to be entitled was not one that he could insist on the enforcement of by a Court, and that the Court had jurisdiction to substitute for the damages agreed upon by the parties such sum as it might consider reasonable, if the agreement between the parties appeared unreasonable or oppressive. This was undoubtedly the view adopted by the Courts of equity in England whose jurisdiction was not confined like that of the Courts of common law to cases which were expressly provided for by statute Both in England and India the Courts purported to give relief ostensibly by construing the intention of the parties and holding where necessary that they did not mean what according to the clear terms of the contract they stated they did mean. This course was adopted in order that the Courts might not appear to lay down a rule that they were not bound to enforce the contract between the parties But if we get rid of fictions and face the truth, then the rule really laid down was that contracts which the Court would regard as secondary, meant to enforce the primary rights of the parties were not strictly enforceable. In the Madras High Court no general rule was laid down in *Arulu Mastry* v. *Wakuthu Chinnayan*(1). In *Adanky Rámachandra Row Garu* v. *Indukuri Appalaráju Garu*(2), the rules laid down by the English Courts were not held to be unenforceable, for HOLLOWAY, J., referred to *Dimech* v. *Corlett*(3), as laying down that the Court was not always bound to treat the sum named by the parties as a penalty. The case decided no more than that the sum named may be treated as liquidated damages and that it should be so treated in the particular case

It was in this condition of things that the Indian Contract Act, IX of 1872, was passed. The framers of that Act attempted to get rid of fictions. For instance, what are called implied contracts in English law were not treated as real contracts in the Act, but were dealt with separately as relations resembling contracts. See sections 68 to 72. Similarly it abolished the distinction between penalty and liquidated damages. The Courts were no longer required, where a sum was named in a contract as the amount to be recovered in case of breach, to decide by

(1) (1864) 2 M H C.R., 205. (2) (1865) 2 M.H.C.R., 451
(3) (1859) 12 Moo., P.C.C., 199 at p. 229.

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artificial rules that the parties did not intend what according to the agreement they clearly did. Section 74 provided that in every case "where a sum is named as the damages to be paid, the party complaining of the breach is entitled to recover only reasonable compensation not exceeding the amount named." The naming of an amount was taken only to indicate the intention that no higher sum should be claimed in case of breach. The section, however, apparently provided in terms for only one class of cases, namely, where a sum *in solido* was named as payable in case of breach. It did not deal with all the cases in which in England Courts of equity refused to enforce agreements providing for the damages payable for breaches of contract. The English rules had been adopted both by the Bombay and Calcutta High Courts. There was apparently no reason to suppose that the Contract Act intended to prevent Indian Courts from exercising their rights to administer equitable doctrines apart from the rule contained in section 74. The Indian Contract Act was not a consolidating statute, but purported only "to define and amend certain parts of the law relating to contracts" See *Irrawaddi Flotilla Co.* v. *Bugwandas*(1) and there was no reason why other rules of contract not embodied in the Act but not inconsistent with its provisions should not be enforced.

The case law after the enactment of the Act often discloses a desire on the part of some Judges to take it that all stipulations in a contract between the parties not coming within the purview of section 74 should be enforced. Thus in *Mackintosh* v. *Crow*(2), it was laid down that Act XXVIII of 1855 and section 74 of the Contract Act must be taken to embody the whole law relating to interest. That view was followed in *Arjan Bibi* v. *Asmat Ali Chowdhuri*(3). See also *Appa Rau* v. *Suryanárayana*(4), which dissented from *Dip Narain Rai* v. *Dipan Rai*(5). This idea led to the attempt to include within the purview of the expression, "if a sum is named in the contract as the amount to be paid" in case of breach of contract, cases which would, according to the ordinary meaning of the words, seem not to come within it. There was no necessity for doing so if the Courts realized that only a part of the law relating to penalties was intended to be

(1) (1891) L.R., 18 I.A., 121
(2) (1883) I.L.R., 9 Calc., 689.
(3) (1886) I.L.R., 13 Calc., 220.
(4) (1887) I.L.R., 10 Mad., 203.
(5) (1886) I.L.R., 8 All., 185.

embodied in section 74. It was held that if a larger sum than the amount payable under the primary terms of the contract was made payable by a provision for payment of interest at an increased rate, that was practically tantamount to naming a sum certain, for the sum was ascertainable by making a computation at the higher rate of interest See *Mackintosh* v. *Crow*(1), *Kala Chand Kyal* v. *Shib Chunder Roy*(2), *Naniappa* v. *Naniappa*(3). A contrary view was, however, held in other cases. See *Banke Behari* v *Sundar Lal*(4), *Vythilinga* v. *Sundarappa*(5) (per INNES, J.), *Dullabhdás Devchandshet* v *Lakshmandás Swarupchand*(6) (per JARDINE, J), *Umarkhan* v. *Salekhan*(7), *Baij Nath Singh* v *Shah Ali Hosain*(8) There was again a difference made between an agreement to pay enhanced interest from the date of the bond and an agreement to pay it from the date of default. In *Mackintosh* v. *Crow*(1), WILSON, J., held that in the former case on the date of the breach there would be a sum due according to the increased rate larger than the amount due according to the primary contract, but that where the enhancement is to operate only from the date of default it could not be said that any definite larger sum would then be due. MITTER, J , pointed out in *Baij Nath Singh* v. *Shah Ali Hosain*(8), that even where the enhancement was to operate from the date of the bond, only a part of the increased amount could be computed on the date of the breach, as according to the agreement between the parties an increased amount would be due also subsequently, until payment. Accordingly, in *Kala Chand Kyal* v. *Shib Chunder Roy*(2), BANNERJEE, J , held that the amount due up to the date of the breach would not be enforceable as of right, but that the agreement for the period subsequent thereto would not come within the purview of section 74. The learned Judge's view as to the proper decree to be passed was in accordance with *Burton* v *Slattery*(9), as stated in *Umarkhan* v. *Salekhan*(7). But the majority of the Judges in that case held that the agreement could not be so split up. The Madras High Court considered Mr. Justice MITTER's criticism of the application of section 74 to such cases as unsound. It was generally held that

(1) (1883) I.L.R., 9 Calc., 689. (2) (1892) I.L.R., 19 Calc., 392 at p. 398.
(3) (1889) I.L.R., 12 Mad., 161. (4) (1893) I.L.R., 15 All., 232.
(5) (1883) I.L.R., 6 Mad., 167. (6) (1890) I.L.R., 14 Bom., 200.
(7) (1893) I.L.R., 17 Bom., 106. (8) (1887) I.L.R., 14 Calc., 248.
(9) (1725) 5 Brown, 233 (Parliamentary Cases Reports).

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an agreement to pay increased interest from the date of default, was not penal and should be enforced. See *Nanjappa* v. *Nanjappa*(1). *Mackintosh* v. *Crow* (2) *Dullabhdás Devchandshet* v. *Lakshmandás Swarupchand*(3) *Pardhan Bhukhan Lal* v. *Narasing Dyal*(4) Now, according to the language of section 74, it applies "if a sum is named in the contract as the amount to be paid *in case of breach*," which *primá facie* means, "in case or if the contract is broken." But it was interpreted to mean, "if a sum is named as the amount to bet paid *at the time* of the breach of the contract," and this was made the basis of the distinction between cases where the enhancement of interest was to have effect from the date of the bond and those where it was to operate from the date of default. If the language be taken to mean, "if the contract is broken," then no distinction could be made between the two classes of cases, and the reasoning which made an agreement to pay increased interest from the date of the bond unenforceable would be equally applicable to the other class of cases. In *Balkishen Das* v. *Run Bahadur Singh*(5) the Privy Council would seem to have made no distinction between the two classes of cases and they decreed the enhanced interest from the date of the bond, enforcing the terms of a compromise to that effect. This decision was held in some subsequent cases in India to have overruled the distinction made in the previous decisions of the Calcutta High Court between cases where the increase in interest was provided for from the date of the bond and those where it was to take effect from the date of default. See *Baij Nath Singh* v. *Shah Ali Hosain*(6) *Basavayya* v. *Subbarazu*(7), *Banke Behari* v. *Sundar Lal*(8). But in other cases it was held that the judgment of the Privy Council has no such effect [see *Nanjappa* v. *Nanjappa*(1), *Umarkhán* v. *Salekhán*(9), *Kala Chand Kyal* v. *Shib Chunder Roy*(10)], and the distinction between the two classes of cases was maintained. It was stated that, where the agreement was for payment of higher interest from date of default, the contract must be regarded as one to pay one rate of interest up to a certain time and a different and higher rate of interest after that time. In other words the

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(2) (1883) I.L.R., 9 Calc., 689.
(3) (1890) I.L.R., 14 Bom., 200.
(4) (1899) I.L.R., 26 Calc., 300.
(5) (1884) I.L.R., 10 Calc., 305. (P.C.)
(6) (1887) I.L.R., 14 Calc., 248.
(7) (1898) I.L.R., 11 Mad., 294.
(8) (1893) I.L.R., 15 All., 232.
(9) (1893) I.L.R., 17 Bom., 106.
(10) (1894) I.L.R., 17 Mad., 62.

agreement to pay enhanced interest was regarded as a primary contract of the same character as the agreement to pay the principal lent out with interest on the date fixed. See *Mackintosh* v. *Hunt*(1), *Muthura Persad Singh* v. *Luggun Koer*(2), *Mackintosh* v. *Crow*(3), *Deno Nath Santh* v. *Nibaran Chandra Chuckerbutty*(4), *Nanjappa* v. *Nanjappa*(5). It need hardly be said that such an interpretation is quite inconsistent with the view adopted in the Courts in England. It must be observed that in *Sundar Koer* v. *Rai Sham Kishen*(6), the Privy Council approved of the view that a provision for enhanced interest should always be regarded as penal where it is to operate retrospectively. They also approved of the reason given in *Mackintosh* v. *Crow*(3), and *Nanjappa* v *Nanjappa*(5), that in such a case "an additional money payment became immediately payable by the mortgagor." Again, notwithstanding the apparent intention of section 74 of the Contract Act, to relieve the Courts of the labour of finding out whether the intention of the parties was to mention a sum as liquidated damages or as penalty, the artificial attempt to base the rules to be followed by the Court on the so-called intention of the parties was adhered to in several cases. See *Muthura Persad* v. *Luggun Koer*(7), *Umarkhán* v. *Salekhán*(8), *Narayanasami Naidu* v. *Narayana Rau*(9), *Banke Behari* v. *Sundar Lal*(10) Notwithstanding also the attempt to give as large a scope as possible to the expression "naming of a sum as payable in case of breach," the equitable jurisdiction of the Court to treat any provision in a bond, regarding the damages to be paid for breach of the covenant to pay on the due date as a penalty not enforceable as of right was repeatedly asserted in a number of cases, after the Act was passed See *Ramendra Roy Chowdhury* v *Serajjudin Ahamed*(11), *Pardhan Bhukhan Lal* v. *Narsing Dyal*(12), *Deno Nath Santh* v. *Nibaran Chandra Chuckerbutty*(4) *Dullabhdás Devchandshet* v. *Lakshmandás Swarupchand*(13), *Narayanasami Naidu* v. *Narayana Rau*(9) (*per* BEST, J.), *Banwaridas* v. *Muhammad Mashiat* (14) (*per* EDGE, C. J). In *Umarkhán* v. *Salekhán*(8),

(1) (1877) I.L.R., 2 Calc., 202.
(2) (1883) I.L.R., 9 Calc., 615.
(3) (1883) I.L.R., 9 Calc., 689.
(4) (1900) I.L.R., 27 Calc., 421.
(5) (1889) I.L.R., 12 Mad., 161.
(6) (1907) I.L.R., 34 Calc., 150.
(7) (1887) I.L.R., 9 All., 615.
(8) (1893) I.L.R., 17 Bom., 106.
(9) (1891) I.L.R., 17 Mad., 62.
(10) (1893) I.L.R., 15 All., 232.
(11) (1898) 2 C.W.N., 234.
(12) (1899) I.L.R., 26 Calc., 290.
(13) (1890) I.L.R., 14 Bom., 200.
(14) (1887) I.L.R., 9 All., 690.

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(5) (1884) I.L.R., 10 Calc., 305 (P.C.)
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(7) (1898) I.L.R., 11 Mad., 294.
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(4) (1900) I.L.R., 27 Calc., 421.
(5) (1889) I.L.R., 12 Mad., 161.
(6) (1907) I.L.R., 34 Calc., 150.
(7) (1887) I.L.R., 9 All., 615.
(8) (1893) I.L.R., 17 Bom., 106.
(9) (1894) I.L.R., 17 Mad., 62.
(10) (1893) I.L.R., 15 All., 232.
(11) (1898) 2 C.W.N., 234.
(12) (1899) I.L.R., 26 Calc., 290.
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SARGENT, C. J., observed, "as to this Court, however, we cannot doubt that until the Judges who decided the cases of *Dullabhdás Devchandshet* v. *Lakshmandás Swarupchand*(1), and *Sajáji Panháji* v. *Máruti*(2), reviewed the decision in *Rasiji bin Darláji* v. *Sayáná bin Sagduetal*(3), *Motoji bin Ratnáji* v. *Shekh Husen*(4), and *Pará* v. *Govind*(5), by the light of the more recent decisions of the other High Courts, it has been always considered that an enhancement of the rate of interest in default of payment of the principal sum and interest at the day fixed in the bond was in the nature of a penalty, whether the enhancement was retrospective, taking effect from the date of the loan, or was prospective from the date of default of payment. An examination of the facts in *Motoji bin Ratnáji* v. *Shekh Husen*(4) and *Pará* v. *Govind*(5), can leave no doubt, we think, that the Court was in both cases dealing with prospective enhancement of interest, and in *Ragunathráv* v. *Yashwant*(6), where it is plain that the question was as to the enhancement of interest from the day fixed for payment of the instalments, MELVILL and WEST, JJ., treated as well settled by the decisions in *Rasáji bin Darláji* v. *Sayáná bin Sagdu et al*(3), *Pará* v. *Govind*(5) and *Tikamdas Javahirdas* v. *Ganga*(7), that the agreement to pay such increased interest was a penalty and ought not to be enforced."

In several cases where the contract provided for payment of the debt with simple interest at a certain time and for payment, on default, of compound interest at an increased rate, the stipulation for such payment was regarded as a penalty. See *Baid Nath Das* v. *Shamanand Das*(8), *Dip Narain Rai* v. *Dipan Rai*(9). It was impossible to do this by any possible interpretation of section 74 of the Act, but only by regarding the stipulation as a penalty apart from that section. On the whole, the case law shows that, while an attempt was made to reduce the Court's powers of interfering with the rate of damages prescribed by the parties to the cases covered by section 74 of the Act, which for that purpose was interpreted in a sense broader than the words

(1) (1890) I.L.R., 14 Bom., 200.
(2) (1890) I.L.R., 14 Bom., 274.
(3) (1869) 6 Bom., H.C.R., 7 (A.C.J.)
(4) (1869) 6 Bom., H.C.R., (A.C.J.)
(5) (1873) 10 Bom., H.C.R., 358.
(6) (1882) P.J., 223.
(7) (1874) 11 Bom., H.C.R., 303.
(8) (1895) I.L.R., 22 Calc., 143.
(9) (1886) I.L.R., 8 All., 185.

would seem *primâ facie* to convey, the court's right to treat any provision not coming within the purview of section 74 as penal was again and again asserted, and relief was given to the debtor in cases which it would be obviously impossible to bring within the scope of the section, and the attempt to impute to the parties an intention conformable to the rules which the courts thought fit to lay down was carried on notwithstanding the provision in section 74 that the parties' intention was not to be the test of the court's action in cases covered by the section.

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What then is the real principle underlying the court's interference with the contract between parties as to a payment to be made by way of damages? In my opinion it can be no other than this—the doctrine that the court will carry out all contracts between parties is confined to the carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract, to be binding on the promisor if he breaks this contract, is regarded as a secondary one intended to secure the fulfilment of the primary contract; and the courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness. This view has been laid down for too long a time to admit of question. For the application of the rule, it is, of course, necessary as an indispensable preliminary that the court should first decide whether the agreement consists of a primary contract with a secondary one to secure its due fulfilment or of two contracts either cumulative or in the alternative. The promisee would have the right to enforce both the contracts in the former case and the second alternative in the latter case if the first alternative be not fulfilled by the promisor. It was the recognition of this principle that apparently led the Indian courts in some cases, as already pointed out, to treat an agreement to pay increased interest from date of default as an alternative contract; but the construction of the contract should not proceed on the court's view as to the reasonableness or otherwise of what in fact is a secondary contract. If the secondary contract is a just and reasonable one, the court, of course, has the power to award the damages secured by it as reasonable in the

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circumstances. Such award need not and ought not to be made to depend on the construction of the contract itself as an alternative one. There is, moreover in my opinion, no reason to regret the well established rule that the court is not bound to enforce the performance of such secondary contracts; for the law does not after all in reality always enforce the performance of the specific promise made by the promisor. As a fact, this is not done in all but a small proportion of cases. It is only where the agreement consists of a promise to pay money that the performance of the specific *promise* is enforced. Specific performance of other agreements is a recent introduction in England of Courts of Equity and is granted only in the discretion of the court in cases where it is considered proper to do so. What is there improper then in the court reserving to itself the discretion to enforce the performance of a secondary contract? The propriety of doing so was, I believe, what really led to the Courts of Equity in England assuming jurisdiction not to award more than a reasonable amount as damages, notwithstanding an agreement between the parties themselves assessing the amount. The principle is pointed out by TURNER, C.J., in *Vengideswara Putter* v. *Chatu Achen*(1). The learned Judge observes: "since the passing of that Act (that is, Act IX of 1872), although the parties may have agreed to enter in the contract an estimate of the damages to be paid in the event of breach, the Court is bound to regard that sum only as the agreed maximum, and to consider whether reasonable compensation will not be made by the award of a less sum . . . . The court has still to determine the question which arose in *Arulu Mastry* v. *Wakutha Chinnayan*(2) whether the terms of a stipulation in a contract created an independent obligation or ascertain the compensation for the breach of an obligation. In the case last mentioned the Court held the stipulation did not ascertain the compensation for the breach of an obligation, but was in itself an independent obligation." In that case a sum of money was advanced under a bond by which it was agreed that the debtor's family should demise certain land on kanom to the creditor and receive a further sum. Interest was to be paid at 6 per cent. upon the advance until the execution of the kanom

(1) (1881) I.L.R., 3 Mad., 224. (2) (1881) 2 M.H.C.R., 205.

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deed, and interest at 24 per cent. from the date of the loan in the event of their not making the demise. The demise was not made. The decision of TURNER, C.J., did not proceed on the applicability of section 74 of the Act. It is clear that the principle above stated would be equally applicable whether the agreement to pay enhanced interest in case of default is to take effect from the date of default or from the date of the bond. It would also be equally applicable to cases where there is no provision for interest until the due date but only an agreement to pay an exorbitant rate of interest in case of default, whether the interest is to run from the commencement of the loan or from the date of default. Unless the contract to pay interest in case of default can be regarded as a cumulative or alternative one the principle would apply, and the court would have discretion not to enforce the promise and to award only reasonable compensation for the damage sustained by non-payment at the time fixed. In *Vythilinga* v. *Sundarappa* (1) the principle was applied to a case where there was no provision for interest until default was committed. The learned Judges, INNES and KINDERSLEY, JJ., followed *Vengideswara Putter* v. *Chatu Achen* (2) already referred to. It is clear they held that it made no difference to them whether there was a provision for payment of interest until the due date or not. The same view was adopted by a Full Bench of the Allahabad High Court in *Bansidhar* v *Bu Ali Khan* (3) STUART, C.J., said: "It appears to me that the document is of a two-fold character. It is a promissory note so far as the agreement to pay Rs. 50 four days after date is concerned, and as such may be detached from the undertaking to pay the interest at one rupee per diem. That undertaking I regard as in the nature of a collateral obligation. Such a collateral obligation might have been made in the form of a separate instrument, or it might be, as in the present case, incorporated with or added on the promissory note. In either case it is in its nature, in my opinion, quite distant from the latter, and is to be regarded and dealt with solely on its own legal merits as a mere penalty or otherwise." Later on he says: "In the present case, however, we have a very different document, for the undertaking to pay interest at one rupee per diem

(1) (1883) I.L.R., 6 Mad., 161 at p. 167. (2) (1881) I.L.R., 3 Mad., 224.
(3) (1880) I.L.R., 3 All., 260.

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is not only not essential to the primary obligation to pay the Rs. 50 four days after date, but is a condition of a highly penal character and legally objectionable, therefore, not only on that ground, but being a penalty and therefore reducible in equity, it must have the effect, if viewed as a necessary part of the whole *rukka*, of destroying its character as a promissory note, inasmuch as there cannot, under such circumstances, be shown to be on the face of the instrument a debt which is a certain and specified sum, the sum recoverable taken in connection with the interest as a penalty being essentially uncertain and incapable of being specified before decree." The learned Judge relied on and followed the judgment of PONTIFEX, J., in *Bichooknath Panday* v. *Ram Lochun Singh*(1). STRAIGHT, J., also adverted to the distinction between the primary contract or the direct object of the document and the secondary or collateral agreement regarding interest. A similar agreement was held to be not penal in *Kunjbehari Lal* v. *Ilahi Bakhsh*(2). The decision however proceeded on the construction of the contract. TYRRELL, J., observed: "This contract interest and the liability to pay it was not made dependent on any breach of any part of the contract."

Vythilinga v. *Sundarappa*(3) and *Bansidhar* v. *Bu Ali Khan*(4) were both decided before the amendment of section 74 by Act VI of 1899. That Act made an important change in the section by giving jurisdiction to the courts not to enforce a stipulation between the parties as to damages and in cases not provided for in the old section, by adding the words, "or if the contract contains any other stipulation by way of penalty." After the amendment, the courts are at liberty not to enforce any stipulation entered in an agreement by way of penalty. I have tried to point out that this power was in fact exercised by the courts even before the amendment. But some decisions had laid down that wherever a sum was not named in the contract as the amount to be paid in case of breach, Act XXVIII of 1855 compelled the court to enforce any provision for payment of interest. There was also a conflict of opinion as to whether section 74 as it stood

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(1) (1875) 11 Beng. L.R., 175. (2) (1884) I.L.R., 6 All., 64.
(3) (1893) I.L.R., 6 Mad., at p. 167. (4) (1880) I.L.R., 3 All., 264.

before the amendment was applicable at all to stipulations for payment of interest in case of failure to pay a debt at the due date. All these difficulties were avoided by enacting in express terms that the court has power to relieve against any stipulation by way of penalty. Whether any provision in a document is a penalty or not is of course for the court to determine. The use of the word "penalty" is not necessary, nor would its use necessarily govern the construction to be put by the court on the contract. The test, as pointed out in several cases, and notably by Lord LINDLEY in *Wallis* v. *Smith*(1) is whether the stipulation is so oppressive, unjust or unreasonable as to make the court hold that it ought not to be enforced in equity. As pointed out in "Parsons on Contracts," Vol. III, page 170, the measure of damages which the law does not allow as enforceable is a penalty. The learned author says: 'It is obvious, that where parties agree upon the damages to be paid for a breach of contract, whatever name they give to it, they do substantially the same thing which is done by a bond with penalty. And there is no more reason why courts should regard the agreement, if it opposes reason and justice, in one case than in the other." See page 172. If the court finds the provisions unreasonable and unjust it holds by a fiction that the parties did not intend that it should be carried out. The real test is the court's opinion regarding the justice and propriety of the provision. The use of the word "penalty," therefore, in the amendment should not be taken to involve any difficulty in the court exercising its jurisdiction in the fullest measure in refusing to enforce any contract which relates to what has to be done in the case of breach of the main contract. In *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*(2) where the contract was to pay the amount of the debt to the stakeholder of a chit fund by half-yearly instalments and further to pay interest at the rate of one pie per rupee per diem from the date of default in the payment of any of the instalments and there was no provision for interest on the principal sum unless default was made, WHITE, C.J., and DAVIES, J., held that the provision for payment of interest could not be regarded as a penalty and must be enforced. The learned Chief Justice observed that the alterations introduced by the amending Act in the section were merely verbal. His

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(1) (1882) I.L.R., 21 Ch. D., 243. (2) (1902) I.L.R., 25 Mad., 343.

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Lordship does not give any reason for this view. There was conflict of opinion in the decisions under the old section, as to whether it was applicable to any case where provision was made for the payment of increased interest whether from the date of default or from the date of the bond. There was also a conflict of opinion on the question whether, in the absence of provision for payment of interest until default, an agreement to pay an exhorbitant rate of interest in case of default could be regarded as penal There was a further conflict of opinion on the question whether the courts had jurisdiction to enforce agreements regarding payment of interest in case of breach of performance of the original contract except in cases falling within the provisions of the old section. The object of the amendment, in my opinion, was to solve all these doubts and to invest the courts with full power to treat any provision regarding damages payable in case of breach as a penalty. The learned Judge adverted to the distinction drawn in the cases between a promise to pay enhanced interest from the date of default and one to pay such interest from the date of the bond. He observed that, while the enacting portion of the section made only verbal alterations, the explanation made a change by enacting that a stipulation for payment of higher interest from date of default might be a penalty. In my opinion, the explanation was put in in consequence of the decisions of the courts that such a stipulation could not be regarded as a penalty. The explanation explains the newly introduced clause, "if the contract contains any other stipulation by way of penalty." Illustration (*d*) gives another example where such a provision would be a penalty. Illustration (*e*) shows that the amended section is applicable where there is no sum named as payable in case of breach. Illustration (*g*) is yet another example of a case which would not fall within the old section. Illustrations (*e*) and (*g*) seem to me to show that the legislature intended to make a very important change in the scope of the section. The learned Judge confines the alteration in the law to the cases covered by the new illustrations. I do not think that this is the right principle in the interpretation of statutes I am doubtful, however, whether the learned Judge intended to lay down that a provision for payment of interest at an exorbitant rate in case of default (where there is no provision for payment of interest till default) cannot in any case be regarded as a

penalty, for his conclusion is expressed in these terms: "It seems to me therefore that as a question of construction section 4 of the Act of 1899 would not *preclude* a court from holding that the stipulation in the contract in question is not a stipulation by way of penalty." I entirely agree so far. But the section in my opinion positively enables a court to do so in a proper case. I do not think that the section is confined to cases where the agreement is to pay a higher rate of interest than the one originally prescribed. Both the learned Chief Justice and DAVIES, J., confined its application to such cases DAVIES, J., went on to say that nothing that parties agreed to with eyes open could be regarded as a penalty. In *Chinna Venkatasami* v *Pedda Kondiah*(1), a similar view was taken but the decision proceeded on the construction of the particular agreement. The court regarded the contract to pay interest from the date of the bond in case of default as an alternative contract In that view the decision was of course right; moreover, the increased rate itself was moderate, so that there was good reason for not regarding it as penal. In *Periasami Thalavar* v. *Subramaniau Asari*(2), where the obligor bound himself to pay 27 kotas of paddy in certain instalments and in default to pay $\frac{1}{16}$ kota per kota per diem for interest from the date of default, the agreement was enforced The learned Judges did not hold that the provision might not be a penalty. They merely said "There is no ground for not allowing the rule of the chit fund to be given effect to" In *Periathambi Udayan* v. *Angammal*(3), MUNRO, J, enforced a provision for payment of interest at 75 per cent. from the date of default in a case where there was no provision for interest till default. The learned Judge held that it was not a penalty. He observed "The defendants are not in a worse position than if at the time they had borrowed the money they had agreed to pay the interest now demanded." I am unable to agree with the reason given by the learned Judge for the general proposition laid down by him. Whether and in what circumstances the court would have power to refuse to enforce an agreement for the repayment of the money lent with interest at an exorbitant rate, is a matter which I wish to abstain from considering in this case But there is an essential distinction

(1) (1903) I L R, 26 Mad., 445. (2) (1904) 14 M L J, 176.
(3) (1909) 19 M L.J., 630.

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between the case put by the learned Judge and the case before him. In the former the question would be whether the court could refuse to enforce the primary and the only contract between the parties. In the latter, the agreement is to pay a sum of money on a certain day and the agreement to pay an exorbitant rate of interest is an agreement to pay damages in case of breach. Such an agreement the court is entitled to treat as a penalty. It may be noted that in England the Money Lenders' Act of 1900 has expressly given jurisdiction to the court not to enforce even the primary agreements in a certain class of cases; but the jurisdiction to refuse enforcement of agreements determining the damages to be paid for breach of the primary agreement has always been exercised in the English courts. EDGE, C.J., was no doubt of opinion in *Banke Behari* v. *Sundar Lal*(1), that it was unwise and improper to do so and that the English decisions should not be followed in this country. I can only say that the courts in England were not influenced by the same economical considerations as the learned Judge was, nor have the courts here been. I may respectfully add that there seems to be more necessity in this country than in England for the courts to abstain from enforcing the views of a particular school of economists. *Salem Town Bank* v. *Venkatachar*(2), is not of much importance, as I do not think that WALLIS, J., intended to lay down a general rule in that case. In *Ganapati Pillai* v. *Sundara Thevan*(3), which was also cited for the defendant, the facts do not clearly appear. Compound interest at 300 per cent. was agreed upon in default of payment on the due date. MILLER and SANKARAN NAIR, JJ., treated the agreement as a penalty. In *Miajan Patari* v. *Abdul Jubbar*(4), the Calcutta High Court dissented from the decision of this court in *Sankaranarayana Vadhayar* v. *Sankaranarayana Ayyar*(5). The terms of the document were similar. They accepted as sound the view enunciated at pp. 278 to 282 of Sir FREDERICK POLLOCK and Mr. MULLA's work on the Indian Contract Act as to the meaning of section 74. I am of opinion that *Sankaranarayana Vadhayar* v. *Sankaranarayana Ayyar*(5), and *Periathambi Udayan* v. *Angammal*(6), were wrongly decided.

(1) (1893) I.L.R., 15 All., 232.
(2) (1911) 1 M.W.N., 134.
(3) (1912) 22 M.L.J., 354.
(4) (1906) 10 C.W.N., 1020.
(5) (1902) I.L.R., 25 Mad., 343.
(6) (1909) 1 M.L.J., 630.

Chinna Venkatasami v. *Pedda Kondiah*(1), and *Periasami Thalavar* v. *Subramanian Asari*(2), are distinguishable from the present case. I agree with the decision of the Calcutta High Court in *Miajan Patari* v. *Abdul Jubbar*(3). I express no opinion on the question whether in the particular circumstances of this case the agreement to pay interest at what amounts to about 180 per cent in case of default should be treated as a penalty or not. That is a matter for the decision of the learned Judges of the Division Bench who made this reference. The question referred to the Full Bench is whether the court is *empowered* to treat such a stipulation as a penalty. It was argued that the provisions of Act XXVIII of 1855 absolutely prevent the courts from interfering with any contract between parties as to interest There are three answers to this agreement. *Firstly*, the Act applies only to primary contracts as to the rate of interest and not to secondary contracts providing for cases of breaches of original contract, a distinction which has been overlooked in *Adanky Ramachandra Row Garu* v. *Indukuri Appalaraju Garu*(4), *Mackintosh* v. *Hunt*(5), *Banke Behari* v. *Sundar Lal*(6), and other cases. *Secondly*, the Act merely repealed the old Anti-Usury law, and did not intend to cut down the equitable powers of courts: see *Umarkhán* v. *Sálekhán*(7) which refers to the earlier Bombay cases, *Bansidar* v. *Bu Ali Khan*(8), *Ramendra Roy Choudhury* v. *Serajudin Ahamed*(9), *Pardhan Bhukhan Lal* v. *Narsing Dyal*(10), *Deno Nath Santh* v. *Nibaran Chandra Chuckerbutty*(11). *Thirdly*, in any event, it is absolutely clear from section 74 of the Contract Act, as amended, that Act XXVIII of 1855 must be regarded as modified by section 74, and even before the amendment it was regarded as modified by the section.

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My answer to the question is that the court has power to do so.

SADASIVA AYYAR, J.—In my order of reference I have indicated my opinion that the court is at liberty to award reasonable compensation in lieu of excessive interest even in cases where no

(1) (1903) I L R., 26 Mad., 445
(2) (1904) 14 M L.J., 136.
(3) (1906) 10 C.W.N., 1020
(4) (1865) 2 M.H C.R., 451.
(5) (1877) I.L R., 2 Calc., 202.
(6) (1893) I L.R., 15 All., 232.
(7) (1893) I.L.R, 17 Bom., 106.
(8) (1880) I.L.R., 3 All., 260.
(9) (1898) 2 C.W.N., 234
(10) (1899) I L.R., 26 Calc., 300.
(11) (1900) I.L.R., 27 Calc., 421.

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interest would have been payable under the contract except in case of default. As I have had the advantage of a perusal of the judgment of Mr. Justice WALLIS (just now pronounced) and as I agree with him in all his observations, I do not wish to make any detailed observations of my own, beyond making a short reference to a few of the most recent cases on the point. In *Sunder Koer v. Rai Sham Krishen*(1), the Privy Council have laid down that where compound interest at a higher rate than that originally stipulated for in the bond was provided for, the court was entitled to give reasonable compensation under section 74 of the Contract Act as amended by Act VI of 1899, and that it was not bound to give the higher rate of interest. In *Velchand v. Vlaqq*(2), SCOTT, C.J., and BATCHELOR, J., refused to give interest at 60 per cent. per annum which was the rate stipulated for in the bond *after date of default* and allowed only 18 per cent. per annum interest as reasonable compensation. The learned Judges refused to follow the earlier decisions which held that a high rate of interest to run only subsequent to date of default cannot be interfered with by courts. They say "It is to be observed, however, that the provisions of section 74 of the Contract Act and its illustration (*g*) were not brought to the notice of the learned Judge. Similarly, in the Indian cases, section 74 as amended by Act V. of 1899, does not seem to have been brought to the notice of the court in argument." In *Ganapati Pillai v. Sundara Thevan*(3), MILLER and SANKARAN NAIR, JJ., held that compound interest at a very high rate, though it was to run only after date of default, can be relieved against and they allowed interest at only 24 per cent. per annum as reasonable compensation. *Ganapati Pillai v. Sundara Thevan*(3) is exactly similar to the present case. I have looked into the printed papers in that case (Second Appeal No 38 of 1906) and I find that in that case also, the plaintiff was a chit karaiswan, the document sued on was executed by a prized subscriber, the debtor agreed to pay the debt (in that case it was grain and not money that was to be repaid) in instalments *without interest* and he promised to pay an exorbitant interest *after default* if he committed default. *Ganapati Pillai v. Sundara Thevan*(3) is therefore a direct authority for the proposition I had contended

(1) (1907) I.L.R., 34 Calc., 150 (P.C.)
(2) (1912) I.L.R., 36 Bom., 164 at p. 168
(3) (1912) 22 M.L.J., 354

for in the reference order. I do not intend to go further than I have done in my reference order into all the English and Indian cases in which learned Judges have, by the use of refined subtle language and the enunciation of variously worded tests and principles, tried to persuade themselves that they were acting on any other principle in giving relief against *primâ facie* unconscionable bargains except the one intelligible principle that the provision relieved against was unreasonable in the view of ordinary men of the world possessing the usual quantum of common sense.

In conclusion, I might state that my reference to the English Money Lenders' Act and the cases decided thereunder was merely to show how the tendency of even English courts has been to liberally construe Acts intended to relieve against exorbitant and harsh stipulations as to interest and not because the provisions of the Money Lenders' Act are identical with the provisions of section 74 of the Indian Contract Act or because the two Acts cover an identical ground or provide exactly similar remedies.

APPELLATE CRIMINAL.

Before Mr Justice Ayling and Mr. Justice Napier.

T. KAMAL KUTTY AND THREE OTHERS (SECOND PARTY, NOS. 2, 3, 4 AND 6), PETITIONERS,

1912. September 11, 12, 16 and October 2.

v.

UDAYAVARMA RAJA VALIA RAJA OF CHIRAKKAL (FIRST PARTY), RESPONDENT.*

Criminal Procedure Code (Act XIV of 1898), ss. 145, 435, 438 and 439—Jurisdiction of High Court to deal in revision with orders passed under section 145—Section 439, meaning of words "otherwise comes to its knowledge"—Sections 438, 439 compared—Section 145, Criminal Procedure Code—Defective preliminary order, effect of.

Sections 143, 144, 145 and 146, Criminal Procedure Code, deal with proceedings which are not criminal or punitive but prohibitive and where cause is shown the local magistracy has unfettered discretion to act under them. Therefore from the use of the word "otherwise" in section 438 a power in the Sessions Judge and the District Magistrate to interfere with such orders cannot be inferred when they are expressly forbidden by section 435 to call for records.

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* Criminal Revision Case No. 44 of 1912.

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Sequiter: the words in section 439, "the record of which has called for by itself" are not limited to cases where the High Court acts *suo motu*.

The history of the law relating to superintendence and revision by the High Court reviewed.

An omission to set forth in a preliminary order under section 145, Criminal Procedure Code, the grounds of a Magistrate's opinion do not affect the jurisdiction of the Magistrate.

Khosh Mahomed Sirdar v. Nasir Mahomed [(1906) I.L.R., 33 Calc., 352], discussed, and *Subrahmania Ayyar v. King-Emperor* [(1902) I.L.R., 25 Mad., 61 (P.C.)], distinguished.

The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure not jurisdiction.

CASE stated under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of U. P. Row, the acting first-class Joint Magistrate of Tellicherry, in Miscellaneous Case No. 30 of 1909.

The facts of this case are set forth in the following order:—

The Hon. the Advocate-General and the Hon. Mr. *T. V. Seshagiri Ayyar* for the petitioners.

Messrs. *E. R. Osborne*, *V. Ryru Nambiar* and *V. K. Narayana Nambisan* for the respondent.

ORDER.—This is a petition put in under section 439 of the Criminal Procedure Code asking for revision of an order of the Joint Magistrate of Tellicherry in Miscellaneous Case No. 30 of 1909 on the 16th October 1911, passed under section 145 of the Criminal Procedure Code. The preliminary objection is taken that the Court in the exercise of its revisional powers under the Code cannot deal with orders made under that section and reliance is placed on section 435, clause 3, which provides that proceedings under chapter XII are not proceedings within the meaning of that section. It is contended however on behalf of the petitioners that the Court can exercise its powers under section 439 without calling in aid section 435. The point has been argued at great length and most ably by Mr. Seshagiri Ayyar. He relies on the words "which otherwise comes to its knowledge" in section 439, clause 1, and contends that that phrase has reference to action taken by the High Court on petition in contradistinction to action taken when the record has been called for "*by itself*" in the earlier words of the section which, he contends, is limited to

action by the High Court *suo motu* He further relies on similar words in section 438 which, he argues, entitled a Sessions Judge or District Magistrate likewise to examine records of proceedings of inferior magisterial officers otherwise than by calling for the records under section 435. He admits that the result of this interpretation of the sections would be that a Sessions Judge or District Magistrate cannot call for and examine and report for the orders of the High Court the records of the proceedings of inferior Criminal Courts under section 144, chapter XII and section 176, but that they can under some power referred to as "otherwise," but the authority for which does not appear, get the record without calling for it and report the case for the orders of the High Court under section 438. That is to say, that the ordinary channel by which proceedings under these sections and all other judgments and orders are examined by the Sessions Judge and the District Magistrate and reported for orders, is blocked up by the legislature with respect to these proceedings but that those officers can still exercise the power of reporting if the record comes before them in some other manner not explained. Now this could hardly have been the intention of the legislature. The recognized procedure by which those Courts exercise revisional jurisdiction over the proceedings of inferior Courts is by calling for the records under section 435. The legislature has taken away that jurisdiction, presumably intending that these proceedings which are all of a special nature should not be interfered with either by the High Court or the Sessions Judge or the District Magistrate. These proceedings are none of them criminal or punitive. Sections 143, 144 and 145 are preventive in the interest of the public peace and public good. Section 176 is a special section empowering a Magistrate to hold an investigation where any person dies when in the custody of the police. We have no doubt that the legislature intended to leave action under these sections where cause is shown to the unfettered discretion of the local magistracy; and we cannot from the use of this word "otherwise" in section 438 infer a power in the Sessions Judge and the District Magistrate to interfere with such orders when they are expressly forbidden by section 435 to call for the records. In our opinion the words in section 439 "the record of which has been called for by itself" are not limited to cases where the High Court acts *suo motu*. It

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must be borne in mind that although when the earlier Criminal Procedure Codes were passed the legislature had chiefly in view the exercise of revisional powers by the High Court and those superior officers on inspection of the calendars, it recognized as early as 1872 that parties would invoke these powers by petition. But in any case whether the High Court or these officers act of their own initiative or on petition, they must call for the records *and in fact the petition invariably asks them to do* so in so many words. The reason why the limiting powers are found only in section 435 will be found on an examination of the history of this legislation.

Act X of 1872 is the first code after the establishment of the High Court. Chapter XXII is headed "superintendence and revision" and begins with section 292 which empowers the High Court to issue general rules for the keeping of books, etc., by all criminal courts and for the preparation and transmission of any calendars or statements to be prepared and submitted by such courts. Section 293 provides that all Subordinate Courts shall send to the High Court such periodical statements or calendars of trials held by such courts as the High Court prescribes exhibiting the offences charged, the offences of which the accused are convicted and the sentences or orders passed upon them. Section 294 proceeds to lay down that the High Court may call for and examine the record of any case tried by any Subordinate Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order and the regularity of the proceedings of such court and section 295 gives the same power to the Court of Session or the Magistrate of the district with regard to the sentences, orders and proceedings of Subordinate Courts. These four sections obviously set out the machinery for revision. The High Court has to make rules for the transmission of the calendars by all courts. All Subordinate Courts are then required to send certain calendars such as the High Court prescribes, direct to the High Court; and if on the examination of a calendar the High Court thinks that there may be something illegal or improper about the order, the next process is to call for and examine the record of such case. The language used in each succeeding section adopts the language of the prior section and it is obvious that these sections contain the machinery. Then comes section 297 which is practically identical with the present section 439 and

this lays down what the High Court can do after examination of the record. It follows therefore that the words "called for by itself" in section 297 have reference to the whole of the powers of revision given by that chapter to the High Court. The last clause of section 297 makes it clear that the High Court can hear any person either personally or by agent in the exercise of its powers of revision which sufficiently indicates that the Legislature contemplated that these powers would be exercised on petition. It will thus be seen that the method by which the records came to the High Court was in one set of sections, namely, 294, 295 and 296 and the power of the High Court to deal with the record was in another section 297, just as now sections 435 and 438 provide the machinery and section 439 gives the power to dispose of the record.

Act X of 1882, the next Code was practically the same as the present Code and continued this method of treatment and in this Code sections 143, 144 and 176 were excluded from the revisional powers The only alteration made by the present Code is that orders under section 145 are added to those excluded. It seems clear therefore that the language in section 439 "the record of which has been called for by itself" is not used in contradistinction to "which otherwise comes to its knowledge" but as contrasted with "which has been reported for orders" and that it has reference to the recognized channels by which the High Court becomes seized of the case, that is to say, either by calling for the record itself or by having the case reported to it under section 438 by a Sessions Judge or District Magistrate who has himself called for the records under section 435; and whether it has called for the record itself or is dealing with it where the record has been called for by a Sessions Judge or District Magistrate and reported to it, in either case the Court is acting both of its own motion and on petition. There is therefore no room for the reading of those words "otherwise comes to its knowledge" as having reference to petition. It cannot be suggested that without those words or the word "otherwise" in section 437 the High Court, a Sessions Judge or a District Magistrate could not act on petition. When once this is clearly understood the difficulty raised by the omission of the Legislature to insert the words "section 439" in the exception clause disappears. Section 435 is the initial power whether exercised by the High Court or the Sessions Judge or the

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District Magistrate, and whether of their own motion or on petition. When the Legislature took away this power it cut off the jurisdiction of the High Court at its fountain-head. The machinery by which the High Court became seized of the case under the Criminal Procedure Code being gone, it was unnecessary to forbid the exercise of powers which depended on such seizing. This view of the meaning of the sections has been uniformly adopted by all the High Courts. It is the recognised practice of this Court never to interfere with the excepted proceedings under its revisional powers but only under the Charter.—*Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh*(1), *Jagomohan Pal* v. *Ram Kumar Gope*(2), *Lokenath Shah Chowdhry* v. *Nedu Biswas*(3) and *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (4), all clearly establish the view of that Court that this jurisdiction of the High Court to revise under the Criminal Procedure Code is gone. *Maharaj Tewari* v. *Har Charan Rai*(5) and *Jhingai Singh* v. *Ram Partap*(6) show that the Allahabad High Court takes the same view. And *In re Pandurang Govind*(7) and *In re Pandurang Govind*(8) lay down the same principle. On the above reasoning and uniform authority of all the High Courts we hold that a petition does not lie under section 439 to revise these proceedings.

It is next argued by Mr Seshagiri Aiyar that these words ("otherwise comes to its knowledge") might have reference to the power of the High Court under the Charter in exercise of its superintendence and that the High Court can call for records under those powers and then proceed to exercise the powers under section 439. The answer to this is that the High Court in its exercise of its powers under the Charter has never purported to deal with cases except where there has been an improper exercise of jurisdiction. Further it would be an extraordinary reading of the Criminal Procedure Code to suggest that it clothed the High Court in the exercise of its powers under the Charter with the whole of the powers that it can exercise on appeal, while at the same time it provided a special machinery apart from the Charter by which the High Court could exercise those powers.

(1) (1899) I.L.R., 26 Calc., 188.
(2) (1901) I.L.R., 28 Calc., 416
(3) (1902) I.L.R., 29 Calc., 352.
(4) (1906) I.L.R., 33 Calc., 352.
(5) (1904) I.L.R., 26 All., 141
(6) (1909) I.L.R., 31 All., 150.
(7) (1900) I.L.R., 24 Bom., 527.
(8) 1901) I.L.R., 25 Bom., 179.

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It has never yet been suggested that the Criminal Procedure Code intended to set up two different procedures in revision; one, the ordinary procedure under sections 435, 438 and 439, and another, by the Charter Act and section 439. Whatever these words in section 439 and the word "otherwise" in section 438 have reference to, it must be some power which the Legislature assumed to exist in the High Court, the Sessions Judge and the District Magistrate under the Criminal Procedure Code. This has been expressly decided with reference to the words in section 438 in *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1), where the Court used the following language.—"We think that these words 'or otherwise' being words of general import following the particular words 'under s. 435' must be construed according to the usual rule, and that they mean not 'in any other way whatsoever' but in any other way provided by the Code" and the Court declined *to accept the contention that they gave the* District Magistrate a power quite independent of the power conferred upon him in cases in which he has proceeded under section 435. We entirely concur with this view. That these words "or otherwise" in section 438 of the Criminal Procedure Code cannot of course have reference to any power outside the Criminal Procedure Code, is clear from the fact that the Code created the Judicial officers whose powers are dealt with therein and that their powers must necessarily be found within the four corners of the Code. That being so, there is no reason why a wider meaning should be given to the words "or otherwise comes to its knowledge" in section 439 and references ought to be made to the Chapter to explain their meaning. If the words in *section 438 are limited to powers to be found in the Code, as they must be, the words in section 439 should be similarly limited.* They are not words which confer a power. They are words which save any power that exists and it is not unusual for statutes to contain saving general words of this nature.

The practical importance of the question we have just considered lies in this. If the order is open to revision under section 439, Criminal Procedure Code, the petitioners may ask us to go into the record of the case, at any rate, to the extent of considering whether there is evidence to support the Magistrate's

(1) (1884) I L R, 10 Calc., 268 at p. 272

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conclusion, or whether any grave irregularity in procedure has been committed, and to bear such facts in mind in deciding as to whether to interfere or not. Of course the power of interference in revision is discretionary; but under section 430 the advisability of interference would be determined on the same considerations as in an ordinary criminal case.

Under section 15 of the Charter Act, on the other hand, it has never been customary to interfere—certainly in cases of this class—except where it can be said that the Magistrate's order was passed without jurisdiction. This is most clearly laid down by a bench of this Court in *Bhaskari Kasavarayudu* v. *Bhaskaram Chalapatirayudu* (1) where their Lordships say, "the Magistrate had jurisdiction to act under section 145, Criminal Procedure Code, and *this Court has no jurisdiction to interfere.*"

Our attention has been drawn to a single case in which interference has been exercised on other grounds—*Reid* v. *Richardson* (2). In that case no doubt the High Court found that the Magistrate had jurisdiction, but nevertheless went into the merits of the case, decided that an order under section 146, Criminal Procedure Code, was the proper order to be passed, and not that passed by the Magistrate under section 145, and disposed of the case accordingly. In so doing they placed it on record that they were departing from the usual course and justified the departure on the unusual circumstances of the case. We cannot attach much importance to an isolated instance of this kind in the face of the otherwise uniform practice to the contrary; and we may say at once that we can discern no exceptional circumstances in the case before us, which would justify departure from the usual course. In a later case of the same Court *Harbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (3) the view taken was that "though powers as a Court of Revision under the Code—Criminal Procedure Code—cannot be exercised, still, if an order challenged be without jurisdiction, that is to say, if it be outside those sections, the mere fact of the order purporting to be so passed would not bring it within those sections, so as to debar the exercise of powers under section 15 of the Charter Act to set it aside as null and void and

(1) (1908) I.L.R., 31 Mad., 518. (2) (1887) I.L.R., 14 Calc., 201.
(3) (1899) I.L.R., 26 Calc., 188 at p. 193.

without jurisdiction." Precisely the same view is taken in *Mahadeo Kunwar* v *Bisu* (1) and in *In re Pandurang Govind*(2).

We, therefore, propose in dealing with the present case to confine ourselves to considering whether the order of the Magistrate which we are asked to revise was passed without jurisdiction. The only ground on which the jurisdiction of the Magistrate in the present case is attacked is his failure to record in the preliminary order passed by him under the first clause of section 145, Criminal Procedure Code, the grounds on which he was satisfied that a dispute existed likely to cause a breach of the peace. The order itself runs as follows. "Whereas on information received from the Tahsildar of Chirakkal, and the Inspector of Police, Cannanore Division, I am satisfied that there is a dispute likely to cause a breach of the peace concerning the possession of * * * * *" Section 145 requires that the preliminary order shall be in writing and shall state the grounds of the Magistrate's being so satisfied. We do not think this requirement has been complied with in the present case. The contention of the learned vakil for the petitioners is that failure to do so goes to the jurisdiction of the Magistrate and renders all subsequent proceedings null and void and without jurisdiction. His chief reliance is on the principle laid down in a Privy Council Case reported in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan Wallud Meer Sudroodeen Khan Bahadoor* (3). This ruling cannot in our opinion be extended to the case before us. The judgment, delivered so long ago as 1855, deals with the effect of the failure to specify in a deed of submission to arbitration the time within which the award was to be given. Bombay Regulation VII of 1827, section 3, requires that this should be specified in the deed of submission, and the Privy Council held that the omission constituted a fatal objection to the validity of the award given thereunder. They stated that "Wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India. . . . . . , and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise

(1) (1903) I.L.R., 25 All., 537. (2) (1900) I.L.R., 24 Bom., 527.
(3) (1855) 6 M.I.A., 134 at p. 155.

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the jurisdiction, for if they be not complied with the jurisdiction does not arise." In applying these observations the important words are "Where such jurisdiction is only given on certain specified terms." That means where jurisdiction is "founded" on compliance with certain preliminary conditions. The regulation under consideration in that case ousts under certain specified conditions the jurisdiction of the ordinary tribunals constituted by law and gives jurisdiction to a private tribunal constituted *ad hoc* and having no existence apart from the particular purpose for which it was constituted. Their Lordships held that these specified conditions must be rigidly and exactly fulfilled. In the present case the section gives to ordinary tribunals in the shape of certain classes of Magistrates the power to do certain things and we are clearly of opinion that the principles laid down in the above ruling have no application to the case before us. If the jurisdiction of a Magistrate to take action under the Criminal Procedure Code is destroyed by failure to comply with any provision of the Code as to his preliminary procedure, then it would have to be held, for example, that failure to sign the complainant's statement on oath as required by section 200, Criminal Procedure Code, rendered any subsequent trial and conviction null and void and without jurisdiction. It may be suggested that such an irregularity would be covered by section 537, Criminal Procedure Code. But that section might with equal propriety be invoked to cover the omission with which we are concerned.

We need do no more than refer to *Subrahmania Ayyar* v. *King Emperor*(1) which has been cited on behalf of the petitioners. That ruling simply deals with the effect of disobedience to an express provision of law as to the mode of trial and in no way touches on the effect of an error of procedure antecedent to the trial or the jurisdiction of the Court. Indeed it shows that *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor*(2) cannot be read as contended for by Mr. Seshagiri Ayyar, for, if it should be so read then the Privy Council in this later case would have held that the whole trial was without jurisdiction owing to the illegality of the charge which is at the inception of the trial.

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(1) (1902) I.L.R., 25 Mad., 61 (P.C.). (2) (1855) 6 M.I.A., 134.

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The applicability of both these rulings to a case like the present has been carefully considered by two learned Judges of the Calcutta High Court (RAMPINI and MOOKERJEE, JJ.) in their order of reference in the case of *Khosh Mahomed Sirkar* v. *Nazir Mahomed*(1) and they have arrived at the same conclusions as ourselves.

The exact effect of an omission to set forth in a preliminary order under section 145 the grounds of the Magistrate's opinion has been considered in several cases both in this and other High Courts, the conclusions arrived at being by no means uniform. In this Court we have on the one side the ruling of MUNRO and SANKARAN NAIR, JJ., in *Posuka Kulla* v. *Tandalgara Chikka Hiria*(2) and on the other side the ruling of SUBRAMANIA AYYAR, J., in *Sayid Mahomed Ghous Saheb* v. *Sayid Kadir Badshaw Saheb*(3) and *In the matter of Chinnappudyan*(4) and of WALLIS, J., in *Posuka Kulla* v. *Tandalgara Chikka Hiria*(2) which was the subject of a Letters Patent Appeal in the case first quoted. Opinions might therefore appear to be equally divided: but a consideration of the judgments in the above cases tends in our opinion strongly against petitioners' contention. SUBRAMANIA AYYAR, J., was undoubtedly of opinion that the failure to record reasons in the preliminary order did not affect the jurisdiction of the Magistrate. WALLIS, J., was of the same opinion. He does not discuss the question but adopts the reasoning of the referring Bench in *Khosh Mahomed Sirkar* v. *Nazir Mahomed*(1) already referred to. MUNRO and SANKARAN NAIR, JJ., do not give reasons for differing from his view, beyond distinguishing the Calcutta case on the ground that in that order a police report was mentioned as the basis of the order. If this be a valid ground of distinction we may point out that in the order in the present case the Magistrate sets forth that he is satisfied "on information received from the Tahsildar of Chirakkal and the Inspector of Police, Cannanore Division." It is therefore by no means clear (to put it on the lowest ground) that the Bench would have held that the Magistrate's jurisdiction was defective in the present case.

But apart from this, we may point out with great respect for the learned Judges composing the Bench that they do not appear

(1) (1906) I.L.R., 33 Calc., 352.
(2) (1908) 4 M.L.T., 213.
(3) (1900) 16 M.L.J., 148.
(4) (1907) I.L.R., 30 Mad., 219.

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to have considered the very weighty reasoning of RAMPINI and MOOKERJEE, JJ., in support of their views on their second point of reference. It is this reasoning which appears to have been relied on by WALLIS, J., and in this reasoning we also concur. It appears to us to be so conclusive that we cannot usefully add anything to it.

It may, of course, be argued that the views of the referring Bench on this point have not been specifically endorsed by the Full Bench which confined itself to answering the first question propounded. But, as we already stated, the arguments of the Bench are, to our mind, convincing even without other authority. The Full Bench has most certainly suggested no dissent therefrom; and we may add that having answered the first question in the negative holding that the initial order was not substantially defective, they could not possibly have come to any other conclusion than one, that the omission to record grounds in the preliminary order did not affect the jurisdiction of the Magistrate.

This is the view which commends itself to us, although we are glad to fortify ourselves by the weighty authority and careful reasoning which we have quoted. The Full Bench of the Calcutta High Court having stated the law of that Court in *Khosh Mahomed Sirkar v Nazir Mahomed*(1) it is not necessary to discuss the earlier Calcutta rulings relied on by the learned vakil for petitioners [*Mohesh Sowar v. Narain Bag* (2) *Nityanand Roy v. Paresh Nath Sen* (3), etc.]. The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. For the above reasons, we decline to interfere with the Magistrate's order and dismiss the petition.

It is none the less the duty of all Magistrates to comply strictly and fully with these and all other provisions of the

(1) (1906) I.L.R., 33 Calc., 352. (2) (1900) I.L.R., 27 Calc., 951.
(3) (1905) I.L.R., 32 Calc., 771.

Code and of District Magistrates where necessary to draw the attention of Subordinate Magistrates to this point.

AYLING AND NAPIER, JJ.

KAMAL KUTTY v. UDAYAVARMA RAJA VALIA RAJA OF CHIRAKKAL.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. January 7, February 8.

SANYASI BARITYA AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

ARTASWARO AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Res Judicata—Decision based on oath, etc., effect of, as—Oaths Act (X of 1873), effect of.

An adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties where the subject matter or the suit is different.

Per curiam. The decision of any matter directly and substantially in issue in a former suit between the same parties would none the less be *res judicata*; because the decision was based on the oath of one of the parties or a witness in the former suit

The effect is similar to that of a decision of a Court based on a finding of an arbitrator or on a compromise between the parties. In all these cases the decision is the decision of the Court and not of the arbitrator or the parties.

APPEAL against the order of T. SADASIVA AYYAR, the District Judge of Ganjam, in Appeal Suit No. 207 of 1911, dated the 16th day of September 1911, preferred against the decree of N. NARASIMHAM GARU, the District Munsif of Aska, in Original Suit No. 1537 of 1909.

The facts of this case are sufficiently set forth in the judgment.

T. Prakasam for appellants.

P. Nagabhushanam for respondents.

JUDGMENT.—The important question of law for decision in this case is, how far an adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue

* Appeal Against Order No. 29 of 1912.

AYLING AND NAPIER, JJ.

KAMAL KUTTY v. UDAYAVARMA RAJA VALIA RAJA OF CHIRAKKAL.

to have considered the very weighty reasoning of RAMPINI and MOOKERJEE, JJ., in support of their views on their second point of reference. It is this reasoning which appears to have been relied on by WALLIS, J., and in this reasoning we also concur. It appears to us to be so conclusive that we cannot usefully add anything to it.

It may, of course, be argued that the views of the referring Bench on this point have not been specifically endorsed by the Full Bench which confined itself to answering the first question propounded. But, as we already stated, the arguments of the Bench are, to our mind, convincing even without other authority. The Full Bench has most certainly suggested no dissent therefrom; and we may add that having answered the first question in the negative holding that the initial order was not substantially defective, they could not possibly have come to any other conclusion than one, that the omission to record grounds in the preliminary order did not affect the jurisdiction of the Magistrate.

This is the view which commends itself to us, although we are glad to fortify ourselves by the weighty authority and careful reasoning which we have quoted. The Full Bench of the Calcutta High Court having stated the law of that Court in *Khosh Mahomed Sirkar* v *Nazir Mahomed*(1) it is not necessary to discuss the earlier Calcutta rulings relied on by the learned vakil for petitioners [*Mohesh Sowar* v. *Narain Bag* (2) *Nittyanand Roy* v. *Paresh Nath Sen* (3), etc.]. The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied *from information of some sort* that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. For the above reasons, we decline to interfere with the Magistrate's order and dismiss the petition.

It is none the less the duty of all Magistrates to co[illegible] strictly and fully with these and all other provisions [illegible]

(1) (1906) I.L.R., 33 Calc., 352. (2) (1900) I.L.R., 27 Ca[illegible]

(3) (1905) I.L.R., 32 Calc., 771.

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An adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties where the subject matter or the suit is different.

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The facts of the case are sufficiently set forth in the judgment.

T. Prakasam for appellants.

P. Nagabhushanam for respondents.

JUDGMENT.—The important question of law for decision in this case is how far an adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue

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* Appeal Against Order No. 26 of 1912.

BENSON AND SUNDARA AYYAR, JJ.
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SANYASI BARITYA v. ARTARWARO

litigation, simply because one of the matters going to make up the issue was decided by the oath of one of them. It should be remembered that the result of an oath under the Oaths Act stands on a different footing from adjudication of suits by oath formerly. The history of the law on the subject is fully set out by MUTTUSAMI AIYAR, J., in *Vasudeva Shanbog* v. *Naraina Pai*(1). The learned Judge points out that according to Regulation III of 1802, section 8, the oath taken by a party itself formed the ground of adjudication by the Court. In other words the oath was in itself decisive of the litigation and did not merely furnish evidence on which the Court was to act. The same principle underlay Regulation IV and Regulation VI of 1816. The mode of adjustment of a suit by the oath of one of the parties was, according to the learned Judge, 1, ignored by the Civil Procedure Code. *Act VIII of 1859 and Act X of 1861 repealed* Regulation III of 1802 and it was held in *K. U. Haje* v. *P. M. Raman Nambiar*(2) that the Courts no longer possessed the power to act under the procedure laid down in the earlier Regulations. In this state of the law the Oaths Act was passed in 1873. As already observed the policy of the Act was not to recognise an oath as a mode of adjustment between the parties but to make the evidence given under the oath a species of conclusive proof. The result appears to be that the decision of any matter directly and substantially in issue in a former suit between the same parties would none the less be *res judicata* because the decision was based on the oath of one of the parties or of a witness in the former suit. The principle of *res judicata* is apparently applicable to findings of arbitrators where the agreement of arbitration does not oust the jurisdiction of the Courts [see Bigelow on Estoppel (5th edition) page 68], the reason being that though the arbitrators give an award, the adjudication still is by the Court which has power to control the action of the arbitrators and set aside their award on certain well-known grounds. On the other hand, where the award is made entirely out of Court, the applicability of the rules of *res judicata* would seem to depend on whether the issues decided by them were themselves referred for their arbitration or only the subject matter of the controversy then pending between the parties, it

(1) (1879) I.L.R., 2 Mad., 356. (2) (1870) 4 M.H.C.R., 422.

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being reasonable in the latter case to hold that the parties did not intend to do anything more than settle the rights then referred to them, although for the purpose of doing so it might be necessary to arrive at findings upon various questions raised between the parties. See Redman on Arbitration, page 264, and the cases there cited, also Russell on Arbitration and Award (8th edition), page 296. The same principle has been followed in India. See *Wazeer Mahton* v. *Chuni Singh*(1) and *Vyenkatesh Chimaji* v. *Sakharam Daji*(2). The extent of estoppel created by a decree of Court based on the consent of parties, that is, a compromise decree would also depend upon what according to the fair construction of the intention of the parties must be taken to be the basis on which the compromise proceeded, every thing covered by such basis being regarded as finally determined. See *Raja Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty*(3). There appears, therefore, to be no ground for any restriction of the application of the doctrine of *res judicata* to matters decided on oath administered under the Oaths Act, as the legislature has expressly provided that the oath merely furnishes the evidence on which the Court is to base its own decision. See *Majan* v. *Pathukutti*(4), where the effect of the provisions of the Act is explained.

We must now proceed to deal with the decided cases under the Act itself. In *Keshava* v. *Rudran*(5) the facts were that the title to the properties in dispute depended on the question whether a Numbudri to whom a girl was given in the Sarvaswadhanam form of marriage was affiliated to the girl's natural family and was made entitled to its properties. The same was the question on which the decision of the title to another property in contest between the parties in a previous litigation depended. The question was then decided by the oath of one of the parties. The finding given in accordance with the oath was held to be not *res judicata* by TURNER, C. J., and KINDERSLEY, J., in the later suit. The learned Judges say: "The oath having been taken, the Court is constrained to accept the statements of the deponent as true and cannot exercise its judgment in this

(1) (1881) I.L.R., 7 Calc., 727.
(2) (1897) I.L.R., 21 Bom., 4[illegible].
(3) (1912) I.L.R., 35 Mad., 75.
(4) (1907) 17 M.L.J., 545.
(5) (1882) I.L.R., 5 Mad., 259.

BENSON AND SUNDARA AYYAR, JJ.

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being reasc is conclusive evidence only against the person who not intenc be bound thereby. It may well be held that the re- referred tative character of the father would not entitle him to be neces is sons by consenting to abide by the oath of his opponent. betwee s on this ground really that the learned Judges held that the ca rule laid down by the Privy Council in *Girdharee Lall* v. editio *too Lall*(1), as to the effect of the sale of family property in Indi cution of a decree against the father of a Hindu family *Chim* inst the sons was not applicable to the case. In *Ahmed* v. by a *idin*(2), SHEPHARD and BASHYAM AYYANGAR, JJ., held that a com ding on a question of title given on the effect of an oath the cording to the Oaths Act in a previous litigation between the tak rties with respect to the rents for certain years due under a thi ase would be *res judicata* in a subsequent suit for the rents of Se ucceeding years and for possession of the property. It should be noticed, however, that in that case the first Court gave a judgment in the previous suit on evidence given in Court and not under the Oaths Act. That judgment was confirmed on appeal in accordance with an oath taken under the Act. The decision of the learned Judges, however, proceeded on the broad ground that the fact that the judgment given by the Appellate Court proceeded on evidence furnished by the oath did not make any difference. They observed "Moreover, as between the parties, we are of opinion that a decree arrived at after the taking of an oath on a question of fact involved in the case is none the less a final adjudication." They then proceeded to point out that the case of *Jenkins* v. *Robertson*(3) was explained in *In re South American and Mexican Co.*(4). See with regard to this the judgment in *Raja Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty*(5). They distinguished the case of *Keshava* v. *Rudran*(6), from the one before them. With all deference we may express the doubt whether there was any distinction between the two cases, which could lead to a real difference. *Badiaddin Ahmed* v. *Nizamuddin Haidar*(7) referred to in the judgment of the learned District Judge, can hardly

(1) (1874) 1 I.A., 321.

(2) (1901) I.L.R., 24 Mad., 441.

(3) (1861) L.R., 1 Scotch App., 117.

(4) (1895) 1 Ch., 37.

(5) (1912) I.L.R., 36 Mad., 75.

(6) (1906) I.L.R., 33 Calc., 356.

(7) I.L.R., 5 Mad., 279.

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matter. It would be highly dangerous to regard the an issue so arrived at as an adjudication, operati estoppel in any future proceedings. The terms of indicate that the party consents to be bound only in re the subject-matter of the pending proceedings. A party willing to risk so much on the conscience of his opponent knows what, at the outside, his loss will be, but it would reasonable to suggest that he should bind himself further is necessary for the decision of the pending suit, and, a have said, we do not understand that the law compels us to that he is bound to a greater extent." This decision, the lear Judges say, was arrived at by them with some hesitat *There is nothing in any of the sections of the Act limiting* effect of the evidence given on oath to the subject-matter of pending proceedings. The Act merely lays down that any que tion in dispute may be decided according to the evidence give on oath by one of the parties. The learned Judges seem to tre the decision in such a case as resting on the consent of the partie and their judgment is based on their interpretation of the extent of the consent given. That this was the view taken by them is clea from their reliance in support of their view on *Jenkins* v. *Robertson*(1), where the question was whether a compromise decree passed in a suit instituted by a person for the establishment of a public right of way in a Scotch Court would be binding as *res judicata* upon other members of the community. We have already observed that in our opinion this view is not correct and that the decision where the oath is taken under the Act cannot be regarded as standing on the same footing as a compromise decree. In *Timmappayya* v. *Lakshminarayana*(2), INNES and KINDERSLEY, JJ., held that a decree obtained against the father in a Hindu family would not be binding on his sons where the matter in dispute was settled by the oath of the opponent party. *Keshava* v. *Rudran*(3) was relied on in support of the judgment. The case cannot be regarded as an authority for the position that a finding arrived at on an oath would not be binding on the same parties in a subsequent litigation. In fact, the learned Judges referred to the terms of the Oaths Act according to which

(1) (1861) L.R. 1 Scotch Appeals, 117. (2) 1883) I.L.R., 6 Mad., 284
(3) (1882) I.L.R., 5 Mad., 259.

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(5) (1912) I.L.R., 35 Mad., 75.
(6) (1906) I.L.R., 33 Calc., 396.
(7) (1882) I.L.R., 6 Mad., 279.

Ganesha Row v. Tuljaram Row.

The second defendant Rajaram Row did not appear to defend the suit.

The Judge in the Original Court (WALLIS, J.) held that the compromise was valid, and made for consideration, and that the sanction of the Court under section 462 of the Civil Procedure Code, 1882, was not necessary. It was therefore binding on the plaintiff, and a decree was made dismissing the suit.

An appeal by the plaintiff to the High Court came before Sir RALPH S. BENSON, Officiating C.J. and SANKARAN NAIR, J., who affirmed the decree of the Original Court.

The judgment so far as it is material to this report was as follows:—

"It is contended before us that as the plaintiff was a minor defendant in that suit any compromise entered into by the second defendant his father, who was his guardian *ad litem* is not binding on him, as the sanction of the Court was not sought for and obtained. It is argued that though a *bonâ fide* compromise by a father or a managing member of a family of a disputed claim may be in certain circumstances binding on the minor members of the family, yet when the minor is a party to the suit he will not be bound by a compromise entered into by his father, appointed by the Court guardian *ad litem*, without the sanction of the Court: nor will he be bound by any such compromise even when a person other than the father or the guardian under Hindu Law is the guardian *ad litem*, because it is urged that when a guardian is appointed by a Court, the minor becomes a ward of Court and any power which his father or any other person may have to bind his interest in any property in a pending suit is put an end to. We feel that there is great force in this contention, and if it were necessary to decide the question we should hesitate to hold that a minor would be bound by any compromise with reference to such property without the sanction of the Court.

"In this case, however, a decree had been passed determining the rights of the parties and the decree made the money (Rs. 86,000) payable to the plaintiff's father the third defendant in that suit. No sum was payable to the plaintiff who was sixth defendant in that suit. It is, no doubt, true that the money by virtue of the Hindu Law, payable to the plaintiff's father representative of the branch of the family consisting of

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The suit giving rise to this appeal was brought on 7th November 1906 by the appellant to recover from the first respondent Tuljaram Row the sum of Rs. 1,60,205 with interest and for other relief. The plaintiff was the undivided son of Rajaram Row the second respondent who was a brother of the first respondent. The two respondents with two other brothers Ramachandra Row and Latchmana Row at one time formed a joint family with their father one Venkata Row who died in 1871. In 1881 his four sons agreed to divide the family property, but only a partial division was made, a large proportion of the family assets being left in the possession and control of Tuljaram Row as manager. In 1886 Athmaram Row the son of Latchmana Row brought a suit for partition against his father and uncles, and joined as sixth defendant the present appellant born in 1887 and then a minor, and his father Rajaram Row was appointed by an order of Court to be his guardian *ad litem*. In the present suit his cause of action was that after a decree had been passed in the partition suit of 1886 against Tuljaram Row and in favour of Rajaram Row as representing himself and his branch of the family, which decree ordered Tuljaram Row to pay a sum of Rs. 86,000 odd with interest to Rajaram Row, the latter entered into a compromise dated 21st November 1897 with Tuljaram Row and in pursuance of such compromise entered up satisfaction of the decree in respect of the abovementioned sum.

The facts of the case leading up to the compromise are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

In the plaint it was alleged that the plaintiff having been an infant at the date of the compromise was not bound thereby; that the agreement was not *bonâ fide*; that the entering up of satisfaction by Rajaram Row was fraudulent without consideration, made without due regard to the interests of the plaintiff, and without the sanction of the Court as required by section 462 of the Civil Procedure Code, 1882. He prayed for a decree for Rs. 88,731, with interest at 9 per cent. making a total amount of Rs. 1,60,000.

The defendant Tuljaram Row defended the suit denying the allegations of the plaintiff charging want of *bonâ fides* and fraud in connection with the compromise, which he contended was valid and binding on the plaintiff, and repudiating all liability to him.

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The second defendant Rajaram Row did not appear to defend the suit.

The Judge in the Original Court (WALLIS, J.) held that the compromise was valid, and made for consideration, and that the sanction of the Court under section 462 of the Civil Procedure Code, 1882, was not necessary. It was therefore binding on the plaintiff, and a decree was made dismissing the suit.

An appeal by the plaintiff to the High Court came before Sir RALPH S. BENSON, Officiating C J. and SANKARAN NAIR, J., who affirmed the decree of the Original Court.

The judgment so far as it is material to this report was as follows —

"It is contended before us that as the plaintiff was a minor defendant in that suit any compromise entered into by the second defendant his father, who was his guardian *ad litem* is not binding on him, as the sanction of the Court was not sought for and obtained. It is argued that though a *boná fide* compromise by a father or a managing member of a family of a disputed claim may be in certain circumstances binding on the minor members of the family, yet when the minor is a party to the suit he will not be bound by a compromise entered into by his father, appointed by the Court guardian *ad litem*, without the sanction of the Court: nor will he be bound by any such compromise even when a person other than the father or the guardian under Hindu Law is the guardian *ad litem*, because it is urged that when a guardian is appointed by a Court, the minor becomes a ward of Court and any power which his father or any other person may have to bind his interest in any property in a pending suit is put an end to. We feel that there is great force in this contention, and if it were necessary to decide the question we should hesitate to hold that a minor would be bound by any compromise with reference to such property without the sanction of the Court.

"In this case, however, a decree had been passed determining the rights of the parties and the decree made the money (Rs. 86,000) payable to the plaintiff's father the third defendant in that suit. No sum was payable to the plaintiff who was sixth defendant in that suit. It is, no doubt, true that the money was by virtue of the Hindu Law, payable to the plaintiff's father as the representative of the branch of the family consisting of

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himself and his descendants, whether or not they were parties to the suit, and he was entitled to receive it only as ancestral property not as separate property. But so far as the question before us is concerned he was the sole decree-holder entitled to execute the decree or enter up satisfaction. Section 462, Civil Procedure Code, only precludes 'the next friend or guardian for the suit' from entering into any agreement 'on behalf of a minor' without the leave of the Court. If, therefore, some other person had been the minor's next friend or guardian for the suit, then the plaintiff's father could have entered into the agreement now in question with Tuljaram the judgment-debtor on his own behalf without any reference to section 462, Civil Procedure Code. His appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf. But as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into will be binding on the other members, including the plaintiff, only if it is a *bonâ fide* compromise of a disputed claim."

On this appeal

De Gruyther, K. C. and *Kenworthy Brown* for the appellant contended that under the circumstances appearing in the case the agreement of 21st November 1897, and the entering up of satisfaction of the decree in the partition suit were not binding on the appellant because the Court did not sanction the compromise thereby made as was necessary under section 462 of the Civil Procedure Code, 1882. It was necessary for Rajaram Row as representing the minor in the suit to obtain leave of the Court under that section before entering into a compromise which affected the interests of the minor. The Original Court thought it was not necessary, and that "he was not acting as guardian *ad litem* on behalf of the minor, but as the third defendant in the suit" But having been appointed guardian *ad litem* by the Court, he was in anything he did in the suit, controlled by the procedure of the Court, notwithstanding that he was himself a party to the suit. The High Court came to the conclusion that the question did not arise, otherwise that Court would apparently have held that the minor would not be bound by the compromise. Rajaram could not plead his power to bind the minor as the father of a joint family, after the Court

had made him guardian *ad litem* of his son, but would be bound, in order to bind the minor, by the provisions of section 462 as to obtaining the leave of the Court to make the compromise. It made no difference that the money under the decree was payable not to the minor but to Rajaram himself as the father of the joint family.

Sir Erle Richards, K. C. and *A. M. Dunne* for the respondent Tuljaram Row contended that the compromise was valid and binding on the appellant notwithstanding that the leave of the Court to make it had not been obtained. The father of a Hindu joint family, it was submitted, had power to compromise a suit or a decree to which he was a party, without reference to the consent of the Court and apart from anything in the Civil Procedure Code; and section 462 had not put any restriction on the power of a father in the matter of compromising a suit or a decree to which minor members of the joint family were parties. That section, it was contended, was only meant to apply to cases in which the minor had an immediate interest in the subject of the suit or decree. Here the father represented the joint family and the minor had no interest except in the ancestral property. In the present case the decree in the partition suit was not in favour of the minor (the present appellant). It was purposely made in favour of the father: it was so drawn that consent of the Court was unnecessary. The minor could not have executed the decree; there was no decree in favour of the minor. Reference was made to rule 7, Order 21 of Civil Procedure Code (Act V of 1908), and to *Virupakshappa v. Shidappa*(1), which was distinguished from the present case by the Original Court on that ground, namely that there the decree compromised was in favour of the minor and therefore the sanction of the Court was necessary.

Without calling for a reply Their Lordships decided this preliminary point of law in favour of the appellant and gave their reasons for the report later on April 8th.

On the question as to the form of the decree *De Gruyther, K. C.* and *Kenworthy Brown* referred to *Manohar Lal v. Jadunath Singh*(2); and to section 562, Civil Procedure Code,

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(1) (1902) I.L.R., 26 Bom., 109.

(2) (1906) I.L.R., 28 All., 585 at p. 591 s.c., L.R., 33 I.A., 128 at p. 131.

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1882, as to the remand of a case decided on a preliminary point. The decree gave the parties liberty to apply to the High Court.

Sir Erle Richards, K. C. and *A. M. Dunne* were heard for the respondent Tuljaram.

The reasons for the report of Their Lordships were delivered by

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Madras, dated the 28th of September 1909, which, affirming a decree made in the exercise of its Original Civil jurisdiction on the 2nd of September 1908, dismissed the plaintiff's suit.

The facts which have given rise to the present action relate back to the year 1886. The defendants Tuljaram and Rajaram are two brothers, being the sons of one Venkata Row, who died in 1871. Tuljaram and Rajaram, with two other sons of Venkata Row named respectively Rama Chandra Row, since deceased, and Luchmana Row, formed a joint undivided Hindu family. In 1881 there was a dissolution of the joint family and a partial division of the family property. A large proportion of the assets was, however, left undivided in the hands and under the control of Tuljaram, the first defendant, who seems to have been the managing member of the family in respect at least of the business or businesses in Madras.

In 1886 a suit was brought on the Original Side of the High Court of Madras by Athmaram, the son of Luchmana Row, against Tuljaram for ascertainment of the remaining undivided family assets in his hands, for accounts and partition and other reliefs. This seems shortly to have been the general scope of the action instituted in 1886, in which Rajaram, the present plaintiff's father, and other surviving members of Venkata Row's family were parties. The plaintiff, Ganesha Row, who was not born at the time of the institution of the suit, was added as defendant on his birth in December 1887, and by an order dated the 20th November 1888, his father Rajaram was appointed his guardian ad litem.

On the 14th of January 1892 a preliminary decree was made declaring the rights of the parties and directing accounts against Tuljaram.

By the final decree made on the 21st of October 1895 and a subsequent order of the 17th of August 1897, he was declared

accountable to the family for a considerable sum of money, the share of the plaintiff's branch in the total sum being, according to the High Court, about Rs. 86,000. Tuljaram appears to have filed an appeal from the final decree of the first Court, and during its pendency he entered into agreements with the adult parties to the suit by which they either abandoned their claims, as in the case of the plaintiff's father, or compromised them for smaller sums

Rajaram's agreement, which is dated the 21st of November 1897, recites that he "acting for himself and as guardian for his minor son Venkat Row" (another name for the plaintiff) "with a view to terminate the litigation that had been going on in the family for the past eleven years and more, and to make an amicable settlement of all matters in dispute between the several members of the family," and in consideration of the defendant Tuljaram consenting to withdraw his appeal, Rajaram agreed to "relinquish and disclaim for himself and for his minor son Venkat Row" the several sums of money for which Tuljaram was found liable to Rajaram's branch, and "to release and discharge Tuljaram from all liability in respect thereof to himself and to his minor son Venkat Row." And on the 25th of November 1897, Rajaram instructed the Registrar of the High Court "to enter up satisfaction of the decree" in respect of the several sums which amounted in the aggregate to something like Rs. 86,000. Tuljaram also on his side withdrew the appeal he had preferred against the decree. Admittedly no leave was either applied for or obtained from the Court in regard either of the agreement or the entering up of satisfaction of the decree.

Matters remained *in this condition until the plaintiff attained* his majority. After some preliminary proceedings to which it is unnecessary to refer for the purposes of this judgment, he brought this suit on the 7th of November 1906 to recover from the defendant Tuljaram on the basis of the decrees in the suit of 1886 a sum of Rs. 1,00,000 principal and interest.

Rajaram was also made a defendant in this action, and his acts relating to the agreement and the satisfaction entered under it were challenged as fraudulent, without consideration and not binding on the plaintiff, having been made without leave of the Court.

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The learned Judge on the Original Side of the High Court who tried the case was of opinion that the suit was not maintainable in view of the provisions of section 244 of the Code of Civil Procedure. Treating it, however, as an application under that section, he dealt with the matter on its merits.

He held that the compromise entered into by Rajaram was binding on the plaintiff, and that it was supported by consideration which consisted in the withdrawal by Tuljaram of his appeal. The principal ground of his judgment is to be found in the following passage:—

"In this case under the terms of the decree the money in respect of which the agreement AA was arrived at and satisfaction entered up was made payable to the third defendant personally and not to the minor sixth defendant. If the minor had been represented by another guardian *ad litem* the third defendant could just as well have made the compromise and entered up satisfaction of the amount payable to him under the decree and it could not have been suggested that section 462 was applicable to the case. It makes no difference in my opinion that the third defendant happened to be the guardian *ad litem* of the sixth defendant because in making the compromise and entering up satisfaction he was not acting as guardian *ad litem* on behalf of the minor sixth defendant but as the third defendant in the suit."

The learned Judge accordingly dismissed the plaintiff's suit, and his judgment has been affirmed on appeal by the High Court in its Appellate Jurisdiction. With regard to the invalidity of Rajaram's acts as affecting the plaintiff's rights the learned Judges in the Appellate Court have taken the same view as the First Court, that Rajaram, in entering into the compromise, acted in his personal capacity, which they considered him competent to do as "his appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf." They were further of opinion that "as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into will be binding on the other members, including the plaintiff, only if it is a *bona fide* compromise of a disputed claim."

It seems to Their Lordships that there is a fallacy underlying the reasoning on which the Courts below have proceeded. No

doubt a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. Section 462 of the Code of Civil Procedure expressly provides that.

"No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian."

The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian *ad litem* for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a *bonâ fide* settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian *ad litem*, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.

The learned Judges, however, seem to have lost sight of the fact that the agreement, which is challenged in this case, was entered into by Rajaram not only on his own behalf but also on behalf of his minor son, for whom he was guardian in the suit. Their Lordships are of opinion that, in view of the provisions of section 462, he had no authority to enter into any compromise or agreement purporting to bind the minor.

In their Lordships' judgment the fact that the monies were made payable to Rajaram, who was admittedly representing his branch of the family, makes no difference in the duty which lay

GANESHA ROW v. TULJARAM ROW.

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The learned Judges, however, seem to have lost sight of the fact that the agreement, which is challenged in this case, was entered into by Rajaram not only on his own behalf but also on behalf of his minor son, for whom he was guardian in the suit. Their Lordships are of opinion that, in view of the provisions of section 462, he had no authority to enter into any compromise or agreement purporting to bind the minor.

In their Lordships' judgment the fact that the monies were made payable to Rajaram, who was admittedly representing his branch of the family, makes no difference in the duty which lay

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on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of his son.

Their Lordships are of opinion that there should be a declaration in this case that the agreement of the 21st November 1897 and the satisfaction entered thereunder are not binding on the plaintiff and that he is remitted to his original rights under the decrees in the suit of 1886.

Their Lordships will, therefore, humbly advise His Majesty that the decree and judgment of the High Court should be set aside, that a declaration should be made in the terms stated, and that the case should be returned to the High Court to deal with the other questions covered by issues Nos. 6 and 7 arising between the parties.

The respondent Tuljaram will pay the costs of the appeal to the High Court in its Appellate Jurisdiction and the cost of this appeal. The costs of the trial on the Original Side of the High Court, and those which will be incurred in the future proceedings, will abide the result of those proceedings.

Appeal allowed

Solicitor for the appellant: *Douglas Grant.*

Solicitor for the respondent Tuljaram Row—*John Josselyn.*

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. March 15.

P. T. GOVINDA PANIKKER AND NINE OTHERS (Nos. 2 TO 10, LEGAL REPRESENTATIVES OF THE DECEASED FIRST APPELLANT: PLAINTIFFS Nos. 1, 2 AND 4 TO 11), APPELLANTS,

v.

T. P. V. NANI *alias* NARAYANI NANGIAR AND NINE OTHERS (DEFENDANTS Nos. 1 TO 6 AND 8 TO 11), RESPONDENTS.*

Presumption as to ownership of property acquired in the name of junior member of tarwad—Presumption of fact and not of law.

No presumption of law can be raised as to whether properties acquired in the name of a junior member of a tarwad belong to him or to his tarwad. Any presumption to be raised is one of fact.

SECOND APPEAL against the decree of L. G. MOORE, the Acting District Judge of South Malabar in Appeal No. 229 of 1907, presented against the decree of M. MUNDAPPA BANGERA, the

* Second Appeal No. 153 of 1909.

Subordinate Judge of South Malabar at Calicut, in Original Suit No. 48 of 1905.

The following statement of facts is taken from the judgment of the lower Appellate Court —

"Plaintiffs are members of the Panhanampalli Tekkevittil tarwad, first plaintiff being the karnavan. One Sankunni Panikkar, husband of first defendant and father of Defendants Nos. 2 to 5, was admittedly the karnavan of plaintiffs' family from 1887 till June 15, 1895, when he was removed in consequence of the decree in Original Suit No. 6 of 1894. Sankunni Panikkar executed a deed of gift, Exhibit I, on November 15, 1893, in favour of his wife and children in respect of plaint items 1—33 Defendants Nos 1—5 claim items 34—49 under a will Exhibit CXLVII, dated 28th March 1899, executed by Sankunni Panikkar All the properties in suit, except items 45—49, were taken possession of by defendants Nos. 1—5. Plaintiffs accordingly sue to recover possession of plaint items 1—44, and for a declaration that defendants have no rights to items 45 to 49, which are in the possession of the plaintiffs.

"The case of defendants Nos. 1—5 was that Sankunni Panikkar had a right to bequeath the properties which belonged to him exclusively. They contend that some of the properties were obtained by Sankunni Panikkar from his dayadhi, Etakkazhikat Sanku Panikkar, who was not a member of plaintiffs' tarwad, and that the remainder were acquired by Sankunni Panikkar, partly by his own exertions and partly from the profits of properties which he obtained from Sanku. On the other hand plaintiffs' case was that the original acquirer Sanku was a member and karanavan of their tarwad and that certain of the plaint items were tarwad properties. They admitted that certain items were acquired by the deceased Sankunni Panikkar, but contended that the acquisitions were made from tarwad funds for the benefit of the tarwad. The main dispute between the parties is as to whether Sanku Panikkar was, as contended by plaintiffs, a member of their tarwad or whether, as defendants Nos. 1—5 allege, he belonged to Etakkazhikat tarwad which had no community of interest with the Panhanampalli Tekkevittil tarwad."

The lower Appellate Court, agreeing with the Court of First Instance, found that the plaint properties were the private and separate properties of Sankunni Panikkar.

GOVINDA PANIKKER v. NANI.

BENSON AND SUNDARA AYYAR, JJ.

J. L. Rosario for appellants Nos. 2 to 10.

K. P. Govinda Menon for respondents Nos. 2, 4 and 5.

JUDGMENT.—Three points have been argued for the appellants in this second appeal. The first point is that the lower Court has wrongly presumed that properties acquired in the name of a junior member of a tarwad belong to him and not to his tarwad. It has no doubt been stated in several cases by this Court that the presumption is just the other way. See *Vira Rayen* v. *The Valia Rani, Calicut*(1), Second Appeal No. 1153 * of 1888 and Second Appeal No. 1549 † of 1902. We do not,

* ORDER (Second Appeal No. 1153 of 1888).—The Judge appears to us to have overlooked the evidence of Narayanan Mussad (defendant's witness) who speaks of the prior *kanom* and has also not considered the usual presumption that property acquired in the name of an *Anandravan* would ordinarily be acquired by tarwad funds unless he was in possession of separate means of his own [*Vira Rayan* v. *The Valia Rani, Calicut*(1)]. We will ask him to reconsider the issue with reference to these observations and state whether he still adheres to his present finding.

Finding to be returned in six weeks from the date of receipt of this order and seven days after posting of the finding will be allowed for objections.

In compliance with the above orders, the District Judge submitted the following

Finding. The High Court have directed me to reconsider my finding on an issue in this case with reference to certain observations made by them. The first of these remarks is to the effect that I have overlooked the evidence of Narayanan Mussad (defendant's witness) who speaks of the prior *kanom*. As regards this question the District Munsif remarked (paragraph 6 of his judgment) that the similarity in the tarwad name of plaintiffs and the first defendant and Ittaman Nair and the admission of Narayanan Mussad that the tarwads were both in the same *amshom* made it probable that Ittaman Nair belonged to the same tarwad as the plaintiffs and the first defendant. With respect to this I observed in my appeal judgment that it was by no means clear that Ittaman Nair was a member of the first plaintiff's tarwad. What I find that Narayanan Mussad says on this subject is as follows: In examination in-chief he stated that the plaintiff, first defendant and Ittaman Nair were not related to one another. In cross-examination he said that Ittaman Nair lived in Thalinal *amshom* (*i.e.*, the *amshom* in which item No. 1 of the plaint property is situated) and that his house name was Thiyokket Chembra. The house name of the plaintiffs and first defendant is Chembra and the similarity no doubt tends to prove that Ittaman was of the same tarwad with them. The witness however further on in his deposition stated that there was no community of pollution between the plaintiffs and Ittaman. If this be true, they cannot have belonged to the same tarwad and it was a consideration of this statement that was the foundation of the remark in my appeal judgment to the effect that it was by no means clearly shown that they were members of the same tarwad. *If such were the case, I think that* it is only reasonable to suppose that more cogent evidence to prove it would be forthcoming.

(1) (1881) I.L.R., 3 Mad., 141.

however, understand these cases as laying down that there is any presumption of law either way The presumption is one of fact, see Mayne's Hindu Law' paragraphs 289 to 291, and whether a presumption in favour of the property being tarwad property should be drawn or not in any particular case would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of any family funds at the time of the acquisition which disappeared after the

The second observation made by the High Court is that I have not considered the presumption that property acquired in the name of an Anandravan would ordinarily be acquired by tarwad funds *unless he was in* possession of separate means of his own As regards this the pleader for the appellant acknowledges that it is impossible for him to show from the record as it stands at present that the first defendant was in possession of separate funds of his own He however states that he could produce such evidence if permitted to do so. As the remand order of the High Court does not allow me to admit fresh evidence I cannot do so In answer to a question put by me as to why the evidence that is now stated to be available on this point was not produced previously the pleader states that this was due to his being under the impression that the presumption was that property shown to have been acquired in the name of an Anandravan had been purchased with his own separate funds unless it was shown that tarwad funds had been used for the purpose. The pleader can not, however, draw my attention to any decision of the High Court in which it has been held that the presumption is as he states. Under these circumstances I must leave it to the High Court to decide if the request that further evidence on this point should be admitted is one that should be complied with or not.

This second appeal coming on again for hearing the Court delivered the following

JUDGMENT—We see no reason to call for any further evidence. The evidence which respondent now wishes to adduce might have been tendered on the original issue.

We reverse the decree of the Lower Appellate Court and restore that of the District Munsif Appellants are entitled to their costs in this and in the Lower Appellate Court.

† JUDGMENT (Second Appeal No 1519 of 1902).—The fact that a title-deed is in the name of a junior member of a family does not, by itself raise the presumption that the property to which the deed relates, in fact, belongs to him separately. In the present case the second defendant set up a certain case as to the source from which she obtained the money and failed to prove it. Further she has conceded that the property comprised in Exhibit II, although the deed *stands in her name, belongs not to her but to the tarwad.* As the judge's finding seems to be based on an erroneous view as to the onus of proof, we must set aside the finding and remand the case for a fresh finding on the issue as to whether the mortgage bond was in fact the property of the second defendant.

Finding should be submitted within six weeks from this date and seven days are allowed for filing objections

Costs will abide the event.

GOVINDA PANIKKER v. NANI.

BENSON AND SUNDARA AYYAR, JJ.

J. L. Rosario for appellants Nos. 2 to 10.

K. P. Govinda Menon for respondents Nos. 2, 4 and 5.

JUDGMENT.—Three points have been argued for the appellants in this second appeal. The first point is that the lower Court has wrongly presumed that properties acquired in the name of a junior member of a tarwad belong to him and not to his tarwad. It has no doubt been stated in several cases by this Court that the presumption is just the other way. See *Vira Rayen* v. *The Valia Rani, Calicut*(1), Second Appeal No 1153 * of 1888 and Second Appeal No. 1549 † of 1912. We do not,

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* ORDER (Second Appeal No. 1153 of 1888).—The Judge appears to us to have overlooked the evidence of Narayanan Mussad (defendant's witness) who speaks of the prior *kanom* and has also not considered the usual presumption that property acquired in the name of an *Anandravan* would ordinarily be acquired by tarwad funds unless he was in possession of separate means of his own [*Vira Rayan* v *The Valia Rani, Calicut*(1)] We will ask him to reconsider the issue with reference to these observations and state whether he still adheres to his present finding.

Finding to be returned in six weeks from the date of receipt of this order and seven days after posting of the finding will be allowed for objections.

In compliance with the above orders, the District Judge submitted the following

Finding The High Court have directed me to reconsider my finding on an issue in this case with reference to certain observations made by them. The first of these remarks is to the effect that I have overlooked the evidence of Narayanan Mussad (defendant's witness) who speaks of the prior *kanom*. As regards this question the District Munsif remarked (paragraph 6 of his judgment) that the similarity in the tarwad name of plaintiffs and the first defendant and Ittaman Nair and the admission of Narayanan Mussad that the tarwads were both in the same *amshom* made it probable that Ittaman Nair belonged to the same tarwad as the plaintiffs and the first defendant With respect to this I observed in my appeal judgment that it was by no means clear that Ittaman Nair was a member of the first plaintiff's tarwad What I find that Narayanan Mussad says on this subject is as follows · In examination in-chief he stated that the plaintiff, first defendant and Ittaman Nair were not related to one another. In cross-examination he said that Ittaman Nair lived in Tholanal *amshom* (*i e*, the *amshom* in which item No 1 of the plaint property is situated) and that his house name was Thiyokke Chembra. The house name of the plaintiffs and first defendant is Chembra and the similarity no doubt tends to prove that Ittaman was of the same tarwad with them. The witness however further on in his deposition stated that there was no community of pollution between the plaintiffs and Ittaman If this be true, they cannot have belonged to the same tarwad and it was a consideration of this statement that was the foundation of the remark in my appeal judgment to the effect that it was by no means clearly shown that they were members of the same tarwad. If such were the case, I think that it is only reasonable to suppose that more cogent evidence to prove it would be forthcoming

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(1) (1881) I L R, 3 Mad, 141.

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however, understand these cases as laying down that there is any presumption of law either way The presumption is one of fact, see Mayne's Hindu Law' paragraphs 289 to 291, and whether a presumption in favour of the property being tarwad property should be drawn or not in any particular case would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of any family funds at the time of the acquisition which disappeared after the

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The second observation made by the High Court is that I have not considered the presumption that property acquired in the name of an Anandravan would ordinarily be acquired by tarwad funds unless he was in possession of separate means of his own As regards this the pleader for the appellant acknowledges that it is impossible for him to show from the record as it stands at present that the first defendant was in possession of separate funds of his own He however states that he could produce such evidence if permitted to do so. As the remand order of the High Court does not allow me to admit fresh evidence I cannot do so In answer to a question put by me as to why the evidence that is now stated to be available on this point was not produced previously the pleader states that this was due to his being under the impression that the presumption was that property shown to have been acquired in the name of an Anandravan had been purchased with his own separate funds unless it was shown that tarwad funds had been used for the purpose. The pleader can not, however, draw my attention to any decision of the High Court in which it has been held that the presumption is as he states Under these circumstances I must leave it to the High Court to decide if the request that further evidence on this point should be admitted is one that should be complied with or not.

This second appeal coming on again for hearing the Court delivered the following

JUDGMENT—We see no reason to call for any further evidence. The evidence which respondent now wishes to adduce might have been tendered on the original issue.

We reverse the decree of the Lower Appellate Court and restore that of the District Munsif Appellants are entitled to their costs in this and in the Lower Appellate Court.

† JUDGMENT (Second Appeal No 1519 of 1902)—The fact that a title-deed is in the name of a junior member of a family does not, by itself raise the presumption that the property to which the deed relates, in fact, belongs to him separately. In the present case the second defendant set up a certain case as to the source from which she obtained the money and failed to prove it. Further she has conceded that the property comprised in Exhibit II, although the deed stands in her name, belongs not to her but to the tarwad As the judge's finding seems to be based on an erroneous view as to the onus of proof, we must set aside the finding and remand the case for a fresh finding on the issue as to whether the mortgage bond was in fact the property of the second defendant.

Finding should be submitted within six weeks from this date and seven days are allowed for filing objections

Costs will abide the event.

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acquisition, and any other facts that may throw light on the source of the money used for the acquisition. In this case the lower Court has found on a consideration of the evidence on record that the property in question belonged to the deceased Sankunni. On this view it is unnecessary to consider the second question argued by Mr. Rosario whether the finding against his clients that their title to particular items of property is *res judicata* is correct or not. The third point urged is that with respect to the title of Sankunni to the properties bequeathed by him to the defendants it is *res judicata* in their favour in consequence of the decision in Original Suit No. 6 of 1894, on the file of the Subordinate Court, Calicut. The appellate judgment, however, decided the case without adjudicating on that question, and the matter cannot therefore be regarded as *res judicata*. This Second Appeal must be dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. August 29 and September 6.

In re K. GANAPATHI BHATTA (ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898), sec. 403 (1), — Autrefois acquit— *sec.* 403 (4), *scope of—Sanction to prosecute, sec.* 195 — *Indian Penal Code (Act XLV of* 1860), *secs* 182 *and* 211

Sanction was obtained by the complainant to prosecute the accused for an offence under section 211, Indian Penal Code. Accused was tried and convicted but the conviction was quashed by the High Court in revision on the ground that the accused had not committed an offence under that section but under section 182, Indian Penal Code, for which no sanction had been granted. Complainant thereupon obtained sanction to prosecute the accused under section 182, Indian Penal Code. On accused pleading in bar of prosecution section 403 (1), Criminal Procedure Code, the Magistrate overruled the objection and his order was confirmed by the Court of Session. Accused petitioned the High Court.

Held, that the prosecution was barred by section 403 (1), Criminal Procedure Code.

Held further that section 403 (4) refers to the character and status of the tribunal when it refers to competency to try an offence and that a sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal but only a condition precedent for the institution of proceedings.

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* Criminal Revision Case No. 532 of 1910 (Criminal Revision Petition No. 413 of 1910).

In re GANAPATHI BHATTA.

PETITIONS under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of P. A. BOOTY, the Sessions Judge of the South Canara Division, dated the 24th August 1910, in Criminal Miscellaneous Petition No. 18 of 1910, confirming the order of B. KRISHNAYA the Stationary Second-class Magistrate of Puttur in Calendar Case No. 190 of 1910 on his file.

The facts necessary for the report of this case are set out in the following Order

J. L. Rozario, K. P. Madhava Row and *K P. Lakshman Row* for the petitioner.

Dr. *S. Swaminathan* for the Public Prosecutor on behalf of the Crown.

SUNDARA AYYAR AND AYLING, JJ.

ORDER.—This is an application asking this Court to revise an order of the Second-class Magistrate of Puttur disallowing a preliminary objection of the accused to his prosecution for an offence under section 182 of the Indian Penal Code and the order of the Sessions Judge of South Canara refusing to recommend to this Court the quashing of that order.

The facts necessary for the disposal of this petition are briefly as follows.—

On the 5th February 1907 the accused made a complaint to the Police that certain articles had been stolen from his house. On the 11th February the Police made an enquiry in consequence and at that enquiry the accused repeated his complaint and said that he suspected the complainant as the person who committed the theft. It was found that no theft took place at all in the accused's house and that his complaint was false. The complainant then made a complaint in which he alleged that the information laid by the accused on the 5th February and on the 11th February 1907 was false The case was tried by the Deputy Magistrate of Puttur and a charge was framed against the accused under section 211 of the Indian Penal Code in that he instituted a false charge of theft against the complainant on the 11th February 1907. He was convicted of the offence and the conviction was affirmed by the Sessions Court but it was set aside by this Court in Criminal Revision Case No. 405 of 1909. This Court observed "Both Courts have found that there was *no theft and we assume that that finding is correct and that the* information given to the Police was false to the knowledge of

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SUNDARA AYYAR AND AYLING, JJ.

the accused, that is to say, that he knowing that no theft had been committed stated that he suspected two men who were his enemies. This would clearly amount to an offence under section 182, Indian Penal Code, but in our opinion the accused has made no charge against the complainant within the meaning of section 211, Indian Penal Code."

It should be stated that before the presentation of the present complaint the complainant had applied to the Superintendent of Police for sanction to prosecute the accused for an offence under section 182, Indian Penal Code, but it was refused. After the acquittal of the accused by the High Court the complainant applied again to the Police Superintendent for sanction and obtained it.

In the present proceedings the accused is charged with an offence under section 182, Indian Penal Code, of which offence the accused was clearly guilty according to the opinion of this Court in Criminal Revision Case No. 405 of 1909. The preliminary objection to the prosecution with which we are concerned in this petition is that the acquittal of the accused by this Court in Criminal Revision Case No. 405 of 1909 constitutes a bar to the present proceedings under section 403 of the Criminal Procedure Code. The Second-class Magistrate disallowed this objection on the ground that "the offence contemplated by section 182 is not the same as that contemplated by section 211, Indian Penal Code" The two offences may not be the same as observed by him because under section 182 it is necessary that the person who gives information to a public servant must know or believe it to be false. Under section 211, on the other hand, the person who institutes a criminal proceeding against another need not know it to be false; it is sufficient that he should know that there is no just or lawful ground for such proceeding or charge against that person. But this finding is not sufficient for disposing of the objection. A bar under section 403, Criminal Procedure Code, operates, not only where a person has been tried for an offence and convicted or acquitted of it and is sought to be tried again for the same offence, but also where he sought to be tried. "On the same facts for any other offence for which a different charge from the one made against him might have been made on the same facts under section 236 or for which he might have been convicted under section 237." Now,

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in this case, the facts on which the accused was charged in the previous case were that he gave false information on the 5th February 1907 and that on the 11th February he repeated this information and stated that he suspected the complainant of the offence disclosed by the information. The prosecution case was that there was no theft committed at all as alleged by the accused. On that footing it was open to the Deputy Magistrate who tried the previous case to frame a charge against him under section 182 as well as a charge under section 211, Indian Penal Code. Section 236 of the Criminal Procedure Code enacts that "if a single act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences." Now, on the facts alleged it was doubtful whether the accused was guilty of making a false charge under section 211, Indian Penal Code, because it was not clear that his information would amount to the making of a charge against the complainant so as to bring it under that section. But those facts as pointed out by the High Court in Criminal Revision Case No. 405, would clearly bring the act of the accused under section 182, Indian Penal Code.

We are inclined to think that section 236 would be applicable to a case where on the same facts it is doubtful whether the accused committed one offence only or both that offence and another. Dr. Swaminathan appearing for the Crown contends that the case is one falling under section 235, clause (1) and not under section 236. The former section runs in these terms "If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence." Section 403, clause 2, provides that "A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)." It seems to us that section 235 (1) applies to cases where on some of the facts so connected together as to

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form the same transaction one offence may be charged against an accused person, and on other facts forming part of the series of acts another offence may be charged against him. Illustration (*b*) to section 403 is an instance of this :—" A is tried upon a charge of murder and acquitted . . . ; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery." Section 235 (1) seems to us to be inapplicable when the accused is sought to be charged with another offence on the identical facts on which he was charged before with one offence. Clause (4) of section 403 supports this construction. In *Suresh Chandra Sinha* v. *Banku Sadhukhan*(1), the accused was first charged with an offence under section 447, Indian Penal Code, and after he was acquitted of it owing to the non-appearance of the complainant he was again charged with offences under sections 447, 504 and 506, Indian Penal Code. On the same facts MOOKERJEA and CASPERZ, JJ., in *Suresh Chandra Sinha* v. *Banku Sadhukhan*(1), held that section 403 (1) barred the second trial. The learned judges say " The record shows that the second trial is being held in respect of all the offences alleged on the previous occasion, including the offence under section 447, Indian Penal Code. The cases relied on by the Magistrate are distinguishable. . . . The order of the Magistrate directing the issue of processes under sections 447, 504 and 506, Indian Penal Code, is, therefore, set aside." In *Queen Empress* v. *Erramreddi*(2), BRANDT, J., held the same view. There the accused was first charged with committing mischief by cutting certain branches from a tree claimed by the complainant and acquitted. He was again charged with the offence of theft on the same facts. The learned judge held that the second trial was not maintainable. He observed that a charge of theft might also have been made under section 236 and that "clause 2 of section 403 does not apply to this case because the imputed offences of mischief and theft were not distinct offences, nor was there a series of acts, but one act or transaction only, the cutting of the tree and removal of the branches cut." In *Sharbekhan Gohain* v. *The Emperor*(3) PARGITER and WOODROFFE, JJ., held that a person who was tried for offences under sections 201 and 202, Indian Penal Code, and

(1) (1905) 2 C.L.J., 622. (2) (1885) I.L.R., 8 Mad., 193.
(3) (1906) 10 C.W.N., 518 at p. 519.

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acquitted could not be tried again for an offence under section 176 on the same facts They say "now this case does not appear to us to come under section 235, sub-section (1), because the offence of which he has now been convicted is based on the very same facts on which the previous charge under section 202 was based. The case comes rather under section 235, sub-section (2) which lays down that if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences. Thus a charge under section 176, Indian Penal Code, might have been made at the former trial on the very same facts It does not therefore come within sub-section (2) of section 403, Criminal Procedure Code, and is not therefore excluded from the operation of sub-section (1) of that section." Now in this case the falsity of the statement that there was a theft was a part of the charge with respect to the institution of false proceedings under section 211, Indian Penal Code, and if there was no theft at all he must have necessarily known that his information that it took place was false. The present complaint under section 182, Indian Penal Code, is therefore on the same facts as were necessarily involved in the previous charge. Dr. Swaminathan contends that although the false statement of the 11th February 1907 of the occurrence of a theft might be a part of the facts included in the charge in the previous case, the accused's information of the 5th February might be made the subject of a separate charge under section 235 (1). But as already observed the information of the 5th was also complained of in the previous case though the charge framed after the evidence for the prosecution was recorded referred only to the repetition of the information on the 11th. The present complaint therefore is based on a part of the facts which were the foundation of the previous proceedings. Besides the information given by the accused on the two days the 5th and 11th February must in reality be regarded as the same. The repetition of an information given to a public servant may be said to constitute a distinct act of libel but could hardly be said to be a different information.

Dr. Swaminathan has urged another contention in support of his argument that section 403 (1) cannot be a bar to the

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present proceedings He urges that clause 4, section 403 is applicable to this case. That clause provides "a person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried, was not competent to try the offence with which he is subsequently charged." The learned counsel's argument is that inasmuch as at the time of the previous trial the complainant had not obtained the sanction of the Superintendent of Police which was necessary for a complaint of an offence under section 182, Indian Penal Code. The Court which held the previous trial was not competent to try the offence with which the accused is now charged. We are of opinion that the clause refers to the character and status of the tribunal when it refers to competency to try the offence, as shown by the illustrations (*f*) and (*g*) to the section. The Deputy Magistrate was perfectly competent to try a charge under section 182, Indian Penal Code. A sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal; it is only a condition precedent for the institution of proceedings before the tribunal. No authority has been cited to us by Dr. Swaminathan in support of his argument. In *King Emperor* v. *Krishna Ayyar*(1) the learned CHIEF JUSTICE and DAVIES, J., held that the circumstance that the previous case was tried by a Judge with assessors while the offence sought to be enquired into in the subsequent case was triable by a jury would not exclude the applicability of section 403 (1). The learned Judges point out that illustrations (*f*) and (*g*) show that the words 'was not competent to try' mean 'had not jurisdiction to try.' It was the duty of the prosecution in the present case to obtain the required sanction for the trial of an offence under section 182, Indian Penal Code. We are of opinion that section 403 (4) is not applicable to this case.

The result is that in our opinion section 403 (1) constitutes a bar to the proceedings now taken against the accused and we therefore direct the Second Class Magistrate to discharge the accused.

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(1) (1901) I.L.R., 24 Mad., 641.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

In re MUTHIA MOOPAN AND SIX OTHERS (ACCUSED NOS 2, 5, 8, 9, 10 AND 12 IN MISCELLANEOUS CASE NO 34 OF 1910), PETITIONERS IN CRIMINAL REVISION CASE NO 678 OF 1910,

1911. September 1 and 9.

MARUTHA MOOPAN AND TWO OTHERS (ACCUSED NOS 3, 6 AND 7 IN MISCELLANEOUS CASE NO 34 OF 1910), PETITIONERS IN CRIMINAL REVISION CASE NO 679 OF 1910,

AND

RATNASAMI MOOPAN (FOURTH ACCUSED IN MISCELLANEOUS CASE NO 34 OF 1910), PETITIONER IN CRIMINAL REVISION CASE NO 680 OF 1910 *

Criminal Procedure Code (Act V of 1898), sec 107—Security to keep the peace—Section 403—Autrefois acquit—Section 495, withdrawal from prosecution, section inapplicable to security proceedings—No conviction or acquittal under section 107—Sections 112, 117, 118, 119, 253—Section 145, order under, no bar to order under section 107 on same facts.

A preliminary charge-sheet under section 107, Criminal Procedure Code, was withdrawn by the police before the parties mentioned therein were ordered to appear The Magistrate endorsed the charge-sheet to the effect that the accused were acquitted A fresh charge under the same section was subsequently brought by the police against certain of the same persons who had been previously charge-sheeted

Held, that the withdrawal of the first charge-sheet was no bar to proceedings under the second.

"Neither an order of discharge nor of acquittal can properly be made in a case where the accused has not been directed to appear at all"

Section 495, Criminal Procedure Code, is not applicable to security proceedings

An order passed by a Magistrate under section 145, Criminal Procedure Code, is no bar to the same Magistrate binding over the same parties on the same facts under section 107, Criminal Procedure Code

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of T. VIJAYARAGHAVACHARY, the First class Sub-Divisional Magistrate of Tanjore, in Miscellaneous Case No 34 of 1910, dated the 7th November 1910.

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* Criminal Revision Cases Nos 678 to 680 of 1910 (Criminal Revision Petitions Nos. 566 to 568 of 1910).

In re MUTHIA MOOPAN.

The facts of this case are set out in the following Order.

The Hon'ble Mr. *T. Richmond* and *T. Ananlachariar* for the petitioners in Criminal Revision Cases Nos. 678 and 679 of 1910.

C. Narasimhachariar for the petitioner in Criminal Revision Case No. 680 of 1910.

P. R. Grant for the Public Prosecutor on behalf of the Government.

SUNDARA AYYAR AND PHILLIPS, JJ.

ORDER—These are applications asking this Court to set aside the order of the Sub-Divisional Magistrate of Tanjore, directing the petitioners under section 107, Criminal Procedure Code, to give security to keep the peace for one year. One Seethalakshmi Ammal, against whom also proceedings were taken under section 107 along with petitioners but against whom the Magistrate did not think it necessary to pass an order directing her to keep the peace, is the owner of the Kapistalam Estate in the district of Tanjore. She executed a lease of ten villages belonging to her in the year 1903 in favour of one Swaminatha Moopanar for a period of ten years. She, however, cancelled the lease in February 1910 and attempted to take possession of the villages. Swaminatha Moopanar resisted the attempt. This led to an order being passed against Seethalakshmi Ammal under section 144 of the Criminal Procedure Code restraining her from taking forcible possession of the properties. Proceedings were also initiated under sections 145 and 107, Criminal Procedure Code. The preliminary order under section 145, Criminal Procedure Code, was passed on *10th August 1910* and the final order declaring the lessee Swaminatha Moopanar to be in possession and restraining Seethalakshmi Ammal and two others from interfering with his possession until the establishment of their rights in a civil suit was passed on 1st September 1910. A preliminary charge-sheet was laid by the police under section 107, Criminal Procedure Code, on 25th July 1910 against the present petitioners and Seethalakshmi Ammal and a number of other persons. But the police wished to withdraw it in order that they might present a fresh charge-sheet against some only of those included in it. The Magistrate permitted the withdrawal and endorsed on the charge-sheet that the accused were acquitted. A second charge-sheet giving rise to the present proceedings was laid by the police against the petitioners and Seethalakshmi Ammal and another person on the 23rd August

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1910. The Magistrate's final order directing the petitioners to give security is ated 7th November 1910. Objection was taken before the Magistrate to the passing of an order directing the accused to give security under section 107, Criminal Procedure Code, when an order had already been passed under section 145, Criminal Procedure Code But he did not consider that the objection should prevail. He observes "I consider that in the interest of the public peace it is necessary to take security. Swaminatha Moopanar is in possession and the accused labour under the great temptation to dispossess him by violent means as a civil remedy means time and trouble and meanwhile he will be making his profits Their acts in the post do not warrant the belief that they will have recourse only to peaceful means to gain their end." But he did not consider it necessary to pass any order for security against the principal party in the case, Seethalakshmi Ammal, who wanted to regain possession of the property leased by her to Swaminatha Moopanar

It is first argued in revision that as an order was first passed by the Magistrate on the 25th July acquitting the present petitioners in proceedings taken under the same section and on the same facts as the present proceedings it was not open to the Magistrate to reopen the matter on the same allegations and that the order is therefore illegal, and reliance is placed on the provisions of sections 403 and 495, Criminal Procedure Code. We do not think these sections can be held to bar the present proceedings. Nothing had been done with reference to the previous charge-sheet beyond the lodging of the information before the Magistrate No process was issued against those who were mentioned as the accused in the case. No proceedings could therefore be said to have been pending against the present petitioners or any other persons. The Magistrate's action in making the endorsement that they were acquitted was absolutely unwarranted by any section of the Criminal Procedure Code and was quite irregular. In fact the expression "acquitted" was quite unmeaning when there were no accused persons present in Court or had been served with any process for appearance. Section 495 has no application to the case. It applies only where the proceedings could end in an acquittal or discharge of the accused. A proceeding under section 107, Criminal Procedure Code, does not terminate in either of these ways. No

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doubt section 117 enacts that the enquiry in such cases shall be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in summons cases. But the final order to be passed is expressly provided for in section 119, Criminal Procedure Code, which lays down that "If, on an enquiry under section 117, it is not proved that it is necessary for keeping the peace . . . that the person in respect of whom the enquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the enquiry, shall release him or if such person is not in custody, shall discharge him." Section 118, Criminal Procedure Code, shows that if the finding is against the accused no order is to be passed convicting him. The order should be one directing him to execute a bond. If on the other hand the finding is in his favour, section 119 shows an entry is to be made on the record that it is not necessary that he should execute a bond and if he is in custody he should be released; if he is not in custody he should be discharged. In *Velu Tayi Ammal* v. *Chidambaravelu Pillai*(1), MILLER, J., points out that the expression discharged in section 119, Criminal Procedure Code, means merely discharged from custody and is not used in the technical sense of discharged (as opposed to acquitted) from an offence as used in section 253, Criminal Procedure Code. No charge has to be framed against the accused in security proceedings which commence with the making of an order under section 112, Criminal Procedure Code, by the Magistrate "setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required." We have not here therefore a case where the framing of a charge is contemplated at all or as the result of the proceedings an order either of discharge or acquittal is to be passed against any one. It may be noted that even the word "accused" is not used by the legislature with reference to security proceedings though the word is a convenient one and may not inappropriately be made use of for some purposes, but as pointed out by MILLER, J, the use of the word requires caution. That learned Judge held in *Velu*

(1) (1910) I.L.R., 33 Mad., 85

In re MUTHIA MOOPAN. SUNDARA AYYAR AND PHILLIPS, JJ.

Tayi Ammal v. *Chidambaravelu Pillai*(1) that section 437, Criminal Procedure Code, which empowers the High Court or a Sessions Judge to direct a further enquiry to be made where an accused person has been discharged does not apply to orders passed under the security sections. The same view was taken by the Calcutta High Court in *Queen Empress* v. *Iman Mondal*(2). A different view has no doubt been entertained by the Allahabad High Court—see *Queen Empress* v. *Mutasaddi Lal*(3) and *Emperor* v. *Fyaz-ud-din*(4) But with all deference it appears to us that the learned Judges of the Allahabad High Court have not given due weight to the express provisions of the sections of the Criminal Procedure Code, prescribing what orders should be passed in security proceedings. While we are of opinion that section 495, Criminal Procedure Code, is not applicable to security proceedings (section 403, Criminal Procedure Code, stands on the same footing), we are not to be understood as countenancing the idea that it would be right to vex a party repeatedly with proceedings under those sections on the same facts as formed the foundation for previous proceedings when those facts were found insufficient to justify an order for security. The general principles of justice would be against sanctioning such a course In *Emperor* v. *Fyaz-ud-din*(4), KNOX, J., held that such a procedure would not be illegal though the learned Judge added "I wish to guard myself against being understood to hold that I consider that such proceedings should be instituted lightly, or that a Magistrate should not enter upon them without very great care and caution" However that may be it appears to us to be clear that neither an order of discharge nor of acquittal could properly be made in a case where the accused has not been directed to appear at all. The provisions regulating trials and enquiries all contemplate the appearance of the accused as essential for the commencement of the proceedings. See sections 242 and 252 "when the accused appears or is brought before the Magistrate"; section 208 (1) the Magistrate shall "when the accused appears or is brought before him, etc.", section 271 "when the Court is ready to commence the trial the accused shall appear or be brought before it, etc." Attention was drawn to the terms of section 248 "If a complainant, *at any time*

(1) (1910) I.L.R., 33 Mad., 85. (2) (1900) I.L.R., 27 Calc., 662.
(3) (1899) I.L.R., 21 All., 107. (4) (1902) I.L.R., 24 All., 148.

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before the final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused." But it is clear to our minds that the language "at any time before any final order is passed" does not apply to a time before the accused has been ordered to appear inasmuch as section 242, Criminal Procedure Code, applicable to the trial of summons cases says, as already pointed out, that "when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted." We must hold that the order of the Sub-Divisional Magistrate, dated 9th August 1910, on the first charge-sheet that the present petitioners were acquitted must be treated as unmeaning and cannot be availed of by persons against whom no process had been issued. In fact the accused do not seem to have been aware of this order at first and did not plead it in bar to the present proceedings. The next contention urged in support of the petitions is that as an order had been already passed on 1st September 1910 under section 145, Criminal Procedure Code, a further order under section 107, Criminal Procedure Code, is illegal. We have no doubt that although the reason for apprehending a breach of the peace may be a dispute relating to the possession of immoveable property which would be appropriate for the initiation of proceedings under section 145, Criminal Procedure Code, there can be no legal objection to proceeding being taken under section 107. See *Sindama Naik* v. *Zamindar of Kadavur*(1) and *Sheoraj Roy* v. *Chatter Roy*(2). In such cases the Magistrate is bound if moved for the purpose to take steps under section 145 while it is optional with him to proceed under section 107. Where it is considered desirable to move under section 107 it may sometimes work unjustice if only one of the opposing parties is directed to give security to keep the peace. See *In the matter of the petition of Ikram Singh*(3), the object of both sections 145 and 107 is to prevent breach of the peace. An order under section 145 would often be more effective than one under section 107 only, as the former

(1) (1894) 2 Weir's Criminal Rulings, 60. (2) (1905) I.L.R., 32 Calc., 966.
(3) (1899) 3 C.W.N., 297.

order would be of more value by quieting the dispute about possession till a Civil Court pronounces upon the merits of the titles of the combatants. At the same time it would not be right to lay down that it might not be sometimes necessary to take security from one of the opposing factions even after the passing of an order under section 145 where the Magistrate is satisfied that notwithstanding such an order, they are likely to take the law into their own hands. We are not therefore prepared to say that the order of the Sub-Divisional Magistrate in this case was passed without jurisdiction on the ground that he had already decided the dispute about possession under section 145 and restrained Seethalakshmi Ammal and her adherents from disturbing the possession of Swaminatha Moopanar. He was satisfied that in this case the preservation of the public peace required that an order under section 107 should also be passed. There is evidence against all the petitioners that they took part in the attempt to create a disturbance on the 27th June. We do not feel called upon to interfere with the order in revision. We dismiss the petitions

In re MUTHIA MOOPAN. — SUNDARA AYYAR AND PHILLIPS, JJ.

APPELLATE CRIMINAL.

Before Sir Ralph Sillery Benson, the Officiating Chief Justice, and Mr. Justice Sankaran Nair.

THE SESSIONS JUDGE OF COIMBATORE, PETITIONER,

v

IMMUDI KUMARA KANGAYA MANTRADIYAR AND SIX OTHERS (ACCUSED), RESPONDENTS *

1912 September 16 and 18.

Criminal Procedure Code (Act XIV of 1898), sect 208, sub-sec (1) and (3)—Witnesses, refusal of Magistrate to summon, before commitment—Magistrate's discretion.

A Magistrate has a discretion for reasons to be recorded by him to refuse to summon witnesses under section 208, Criminal Procedure Code (Act XIV of 1898) prior to his making a commitment.

Sub section (1), section 208, Criminal Procedure Code, contemplates the production of evidence by the prosecution or by the accused without the aid of the Magistrate Sub-section (3) contemplates the intervention of the

* Criminal Miscellaneous Petition No 305 of 1912.

THE SESSIONS JUDGE OF COIMBATORE v. KANGAYA MANTRADIYAR

Magistrate to secure the attendance of witnesses and in regard to this evidence the Magistrate has a discretion for reasons to be recorded by him to refuse to issue process. When therefore section 210 requires the evidence referred to in section 208, sub-sections (1) and (3), to be recorded before a charge is drawn up it does not require the Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-section (3), he has deemed it unnecessary to summon.

REFERENCE under section 438, Criminal Procedure Code (Act V of 1898), praying the High Court to quash the commitment of the accused in Sessions Case No. 8 of 1912 on the file of the Sub-Magistrate of Kangayam.

The facts of this case are set out in the order.

M. O. Parthasarathy Ayyangar for the accused.

The Hon. Mr. *B. N. Sarma* for the Public Prosecutor on behalf of the Crown.

BENSON, OFFG. C.J., AND SANKARAN NAIR, J.

ORDER.—In this case the Sessions Judge moves us to quash a commitment made to his Court on the ground that the committing Magistrate refused to summon certain witnesses whom the accused desired to be examined by the Magistrate under section 208 of the Criminal Procedure Code prior to his making the commitment. It appears that the examination and cross-examination of the witnesses for the prosecution was closed on the 5th June last and the accused were examined on the same day and stated that their vakil would file written statements on their behalf. The case was therefore adjourned to the 8th June when the written statements were put in and the vakil of the accused argued that there was no sufficient evidence for the prosecution to justify a commitment. Owing to the absence of one of the accused (who was on bail) the case was adjourned to the 11th June and then again to the 20th June and then the present application was for the first time made to summon and examine some sixteen witnesses for the defence. The Magistrate refused to do so as he held that the application was made too late, and he drew up a charge and committed the accused to the sessions on the same day. For the accused it is argued that sections 208, 209 and 210 of the Criminal Procedure Code, rendered it compulsory on the Magistrate to issue the summonses and examine the witnesses, as requested by the accused, and reliance is placed on two unreported decisions of this Court, and on the decisions *Queen Empress* v. *Ahmadi*(1) and

(1) (1898) I.L.R., 20 All., 264

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BENSON, OFFG C.J., AND SANKARAN NAIR, J.

Emperor v. *Muhammad Hadi*(1). We do not think that the contention of the accused can be supported. Section 208 (1) of the Criminal Procedure Code, no doubt requires the Magistrate to record "all such evidence as may be *produced* in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate", and sub-section (3) of the same section enacts that "if the complainant, or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness . . the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so." It will be observed that sub-section (1) contemplates the *production* of evidence by the prosecution or by the accused without the aid of the Magistrate, sub-section (3) contemplates the intervention of the Magistrate to secure the attendance of witnesses and in regard to this evidence the Magistrate has a discretion for reasons to be recorded by him to refuse to issue process, if he deems it unnecessary to do so, when, therefore, section 210 requires "the evidence referred to in section 208, sub-sections (1) and (3)" to be recorded before a charge is drawn up, it does not require the Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-section (3), he has deemed it unnecessary to summon. This procedure appears to be convenient and reasonable, whereas the procedure contended for by the accused, viz, that he may delay asking the Magistrate to summon his witnesses until the last minute before the charge is drawn up and then require him to summon and examine his witnesses, would lead to undue delay in the commitment of cases and the evils which such delay would entail The proceeding before the Magistrate is only an inquiry preliminary to the trial, and while the law in order to avoid unnecessary commitments is careful to require the Magistrate to examine any witness produced before him by the accused, and provides for the Magistrate also summoning and examining witnesses for the defence before a charge is drawn up and even gives the Magistrate a discretion (section 212) to examine witnesses for the defence after the charge is drawn up and to then cancel the charge and discharge the accused (section 213), it does not compel a Magistrate to summon and

(1) (1904) I.L.R., 26 All., 177.

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examine witnesses for the defence after a charge has been drawn up or even before the charge has been drawn up if the Magistrate, for reasons to be recorded, deems it unnecessary to do so.

This distinction between the duty of the Magistrate in regard to evidence *produced* before him by the accused and evidence not produced before him, but which the accused desires him to obtain by the issue of process, has not always, we think, been borne in mind by the Courts and the omission seems to have led the learned Chief Justice of the Allahabad High Court [*Emperor* v. *Muhammad Hadi*(1)], to state the rule in terms wider than those of the code, and wider also than those used in *Queen Empress* v. *Ahmadi*(2), which he refers to in support of his statement of the rule (see also the unreported decision of this Court in Criminal Miscellaneous Petition No. 298 of 1911). Mr. Sarma for the Public Prosecutor has drawn our attention to the case of *Phanindra Nath Mitra* v. *Emperor*(3) in which it is held that section 347 of the Criminal Procedure Code lays down that when a Magistrate has made up his mind to commit an accused for trial "he shall stop further proceedings" and commit the accused for trial, and that this section is not to be read as subject to the provisions in sections 208 to 210 to which we have referred. We are unable to accept this view or to rely on section 347 in support of the Magistrate's action.

Having regard to the subject-matter of sections 346 and 347 and to the corresponding sections in the Code of 1872 (see section 221 of that Code and *Empress of India* v. *Ilahi Bakhsh*(4)), we think that the direction in section 347 to "stop further proceedings" does not justify a Magistrate in disregarding the directions in sections 208 to 210, but only requires him to stop proceeding with the case as a trial and instead to commit the case to the sessions for trial by that Court "under the provisions hereinbefore contained," *i.e.*, under the provisions of sections 208 to 210 and the other provisions in Chapter 18 of the Code. In the present case we agree with the Magistrate that the application by the accused to summon and examine their witnesses was so long delayed that the Magistrate was justified in refusing to accede to it at that stage. *We therefore* see no reason to quash the commitment.

(1) (1904) I.L.R., 26 All., 177.
(2) (1898) I.L.R., 20 All., 264.
(3) (1909) I.L.R., 36 Calc., 48.
(4) (1880) I.L.R., 2 All., 910.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr Justice Abdur Rahim.

V. R S. AVALAPPA NAICKER (PLAINTIFF), APPELLANT, 1912. October 11, 14, 15 and 29.

v

V R R M S T M R MURUGAPPA CHETTIAR AND ANOTHER (DEFENDANTS), RESPONDENTS *

Impartible Zamindari—Alienation beyond alienor's life-time, validity of—Custom of inalienability, effect of—Regulation XXV of 1802

In the absence of proof of a special custom of inalienability, the zamindar of an impartible zamin has power to alienate the zamin for a legitimate family or other necessary purpose beyond his life-time The estate held by him is not analogous to that of an estate tail as it originally stood upon the Statute *de Donis* [Statute of Westminster II (1285) 13 Edw. I, c 1]

The law relating to estates held in impartible zamindaris reviewed

Where the subject of a court-sale was stated to be "the right, title and interest" of the zamindar there is no presumption that what was intended to be sold was merely the life interest of the zamindar in the zamin

APPEAL against the decree of K RAMANATHA AYYAR, the Subordinate Judge of Tinnevelly in Original Suit No 11 of 1906.

This was a suit to recover with future mesne profits the *Pavaly zamin*.

Plaintiff's father, the last zamindar, died on 24th January 1894. The zamindari had, however, been sold at court auction in December 1869 in execution of a decree obtained by first defendant's father, the late Chidambaram Chettiar, against plaintiff's father and purchased by that Chettiar himself. Plaintiff alleged *inter alia* that the zamin was an inalienable *palayam* both by custom and because it had been established for military services to be rendered; that the zamindar for the time being had only a right to enjoy the income of the zamindari; that the debts for which the zamin was sold were not contracted for family necessities, and that the sale could, on no account therefore bind *the zamin beyond the life-time of plaintiff's father.* Plaintiff further alleged that according to law as then understood, the zamindaris were inalienable beyond the life of the zamindar for the time being that first defendant's father brought only the

* Appeal No. 20 of 1909.

AVALAPPA NAICKER v. MURUGAPPA CHETTIAR.

life interest of plaintiff's father to court-sale and purchased it and that on this ground also defendants should restore the zamindari to him.

Defendants, contended *inter alia* that the zamindari was not ancestral property in the hands of plaintiff's father, but was his absolute property, that the zamindari was not inalienable and had been sold outright for debts binding on the zamin, that the decree in execution of which the court-sale was held directed the sale of the zamindari, that it was not the law that zamindaris were inalienable beyond the life of the zamindar for the time being, when the court-sale was held in this case, nor did first defendant's father bring to sale only such limited interest and purchase it, that in fact the zamindari was brought to sale outright and purchased by first defendant's father.

On these pleas the Subordinate Judge held that the debts were properly incurred and the decree binding upon the plaintiff. He further held that the zamin was impartible and in doing so gave the following resumé of its history :— "Plaintiff's family belongs to Kamblam Naik caste and it is alleged in the plaint that this Pavaly zamindari is ancient and impartible, and is also inalienable, more so because it is a zamin of Kamblam Naik. During the period when Naik's family was reigning this district as well as the adjoining Madura district, 72 *palayams* were created for military service to be rendered by Visvanatha Naik who reigned between 1559 and 1563—*vide* page 42 of the Madras Gazetteer (Madura District). Taylor's Oriental Manuscripts contain the description of the 72 palayams created, one of which is this Pavaly *palayam*. In the Fifth Report—Volume II of the Madras Presidency, dated 1799, Pavaly is mentioned as one of the palayams of this district. The origin and existence of 72 palayams aforesaid are described in the *Ramnad Case*(1) and the description of what a *palayam* was is contained in *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (*The Udaiyārpālayam Case*)(2). In Exhibit N which is a copper-plate grant made by Tirumalai Naik who reigned the Pandiyan kingdom between 1623 and 1659, reference is made to this Pavaly *palayam* and it was attested by the then Polygar of

(1) (1901) I.L.R., 24 Mad., 613 at p. 618. (2) (1905) I.L.R., 28 Mad., 508

Pavaly. It is thus undeniable that this zamin is an ancient one and it was also impartible. The judgments of the Courts Exhibit XLIII in the suit of 1823 and Exhibits C series in the suit of 1847 also recognized the impartibility of this zamindari and it was on that basis that the decisions in those suits were arrived at "

In finding that the inalienability was not established by custom he held: "Impartibility does not, however, connote inalienability and this is distinctly pointed out in the Pittapur case reported in *Raja Udaya Aditya Deb* v. *Jadab Lal Aditya Deb*(1), *vide* also *Sri Raja Rao Venkata Surya Mahipati Ramakrishna Rao Bahadur* v *The Court of Wards*(2) and *Anund Lal Sing Deo* v. *Maharaja Dheraj Gurrood Narayan Deo*(3). In the Pittapur case it is laid down that a zamindari in Madras, by custom descending to a single heir by primogeniture, and impartible, is not inalienable in virtue only of its impartibility, in the absence of proof of a custom having the force of law or of some tenure attaching to the zamindari, tendering it inalienable. Plaintiff is bound to prove therefore the inalienability set up by him and the only evidence given by him is the bare testimony of his eleventh witness who swears that he has heard that Kamblam Naik zamins are inalienable. There is thus literally no evidence in support of the custom alleged, but on the other hand defendants have produced considerable documentary evidence to show that impartible zamins are alienated in various instances. The custom set up in the plaint is not proved."

He further held that whatever may have been the terms of the original grant (the grant was not before the Court) a new estate was created when the British Government was established in favour of the plaintiff's predecessor in lieu of the old grant and that the new grant made no reference to any military service rendered as consideration for it The zamindari was at present the creature of Regulation XXV of 1802 which allowed alienation thereof within certain limits prescribed therein. In deciding the issue against the plaintiff he cited *Veera Soorappa Nayani* v. *Errappa Naidu*(4).

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(1) (1882) I L R, 8 Calc, 199
(2) (1899) I L R, 22 Mad, 383 (P.C)
(3) (1850) 5 M I A, 82.
(4) (1906) I.L R., 29 Mad, 484.

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The judgment of the Lower Court continued :—"Venkatachalam Chetty obtained the decree Exhibits XIV (a) and XIV (b) on his bond Exhibit XIV and although the claim had been made on a simple money bond, yet by the *razinamah* entered into between him and plaintiff's father, the whole of the zamin excepting the *pannai* lands was hypothecated for the debt and the decree-holder required to realize the amount decreed by the sale thereof—Exhibit XIV (a). A similar hypothecation was also made on the *pannai* lands of the zamin in respect of the amount decreed under Exhibits XV (b) and XV (c) and it was in these two decrees that first defendant's late father obtained his decree Exhibit F in his suit No. 10 of 1866 on the file of the late Civil Court, Tinnevelly, for sale of the zamindari. In *Joti Kuruvetappa* v. *Izari Sirusappa*(1) it has been held that a hypothecation decree made with the consent of parties in a suit for money on a personal bond, is legally and validly made—*vide* also *Mussamut Phool Kooer* v. *Sheobutun Singh*(2).

"In execution of the decree Exhibit F the property hypothecated thereunder and ordered to be sold by it was brought to sale and purchased by first defendant's late father. Exhibit XVIII is the sale certificate issued to the purchaser and it states that the right, title and interest of the judgment-debtor in the property has been sold under it. Exhibit LV is the order of the Court confirming the sale and it describes the property sold at court auction as the Pavaly zamin as a whole. Exhibits XVIII (a) and XVIII (b) are the warrants issued from Court for delivery of possession to the sale certificate and they also state that the property sold and ordered to be delivered is the whole of the *Pannai* and zamin lands of Pavaly zamindari.

"No doubt the sale certificate states that what was sold was the right, title and interest of the judgment-debtor in the property but this expression was used in accordance with the form prescribed in the Code of Civil Procedure then in force (Act VIII of 1859). The meaning and import of this expression in the certificates of sale was the bone of contention in various cases and it has been repeatedly held by the Privy Council and by the several High Courts in India that the mere use of such expression in them does not mean that the interest sold is less

(1) (1907) I.L.R., 30 Mad., 478. (2) (1869) 12 W.R., 459.

than full proprietary interest, *vide Girdharee Lall* v. *Kantoo Lall*(1), *Venkatasami Naik* v. *Kuppaiyan*(2), *Venkataramayyan* v. *Venkata Subramania Dikshatar*(3), *Suraj Bunsi Koer* v. *Sheo Persad Singh*(4) and *Nanomi Babuasin* v. *Modhun Mohun*(5). As pointed out by the Privy Council in the first and the last of the rulings aforesaid the nature of the debt and the surrounding circumstances should be taken into account in determining the interest sold. The non-inclusion of sons is, it is pointed out, to be taken into account as an element in the consideration of the nature of the debt

"The principle of the decision in *Girdharee Lall* v. *Kantoo Lall*(1) was deduced from an earlier ruling of the Privy Council in *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(6) which lays down that an 'ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and this being so, ancestral property in which the son as the son of his father acquired an interest by birth, is liable to such debts, the rule being that the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.' *Girdharee Lall* v. *Kantoo Lall*(1) and *Venkatasami Naik* v. *Kuppaiyan*(2) draws no distinction between a private sale made by a father and a court-sale held in execution of a money-decree passed against him and lays down that the sales in either case would bind the sons provided that the debt contracted by the father to satisfy which they are made was not contracted by him for illegal or immoral purposes. The Madras High Court was for some time holding that the ruling in *Girdharee Lall* v. *Kantoo Lall*(1) was applicable only to sales in execution of decrees based upon mortgage but not a simple money bond [*vide Sivaganga Zamindar* v. *Lakshmana*(7), *Velliyammal* v. *Katha*(8) and *Ponnappa* v. *Pappuvayyangar*(9)], but since the decision of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*(5) they had to

(1) (1874) I.L.R. I.A., 321.
(2) (1878) I.L.R., 1 Mad., 354
(3) (1878) I.L.R., 1 Mad., 358 (F.B.).
(4) (1880) I.L.R., 5 Calc., 148 at p. 165
(5) (1886) I.L.R., 13 Calc., 21 (P.C.)
(6) (1856) 6 M.I.A., 393
(7) (1885) I.L.R., 9 Mad., 188
(8) (1882) I.L.R., 5 Mad., 61 at p. 65.
(9) (1886) I.L.R., 9 Mad., 343 (F.B.)

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"The principle of the decision in *Girdharee Lall* v. *Kantoo Lall*(1) was deduced from an earlier ruling of the Privy Council in *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(6) which lays down that an 'ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and this being so, ancestral property in which the son as the son of his father acquired an interest by birth, is liable to such debts, the rule being that the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.' *Girdharee Lall* v. *Kantoo Lall*(1) and *Venkatasami Naik* v. *Kuppaiyan*(2) draws no distinction between a private sale made by a father and a court-sale held in execution of a money-decree passed against him and lays down that the sales in either case would bind the sons provided that the debt contracted by the father to satisfy which they are made was not contracted by him for illegal or immoral purposes The Madras High Court was for some time holding that the ruling in *Girdharee Lall* v. *Kantoo Lall*(1) was applicable only to sales in execution of decrees based upon mortgage but not a simple money bond [*vide Sivaganga Zamindar* v. *Lakshmana*(7), *Velliyammal* v. *Katha*(8) and *Ponnappa* v. *Pappuvayyangar*(9)], but since the decision of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*(5) they had to

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(2) (1878) I.L.R., 1 Mad., 354.
(3) (1878) I.L.R., 1 Mad., 358 (F.B.).
(4) (1880) I.L.R., 5 Calc., 148 at p. 165.
(5) (1886) I.L.R., 13 Calc., 21 (P.C.).
(6) (1856) 6 M.I.A., 393.
(7) (1886) I.L.R., 9 Mad., 188.
(8) (1882) I.L.R., 5 Mad., 61 at p. 65.
(9) (1886) I.L.R., 9 Mad., 343 (F.B.)

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abandon such distinction—*vide Narasanna* v. *Gurrappa*(1) and *Kunhali Beari* v. *Keshava Shanbaga*(2).

"In the present case the decree Exhibit F was passed for sale of this zamindari, treating the decrees Exhibits XIV (*a*) and XIV (*b*) and XV (*c*) on which it is passed as decrees made on hypothecation of the zamindari. The distinction that used to be drawn by our High Court between a sale in execution of a mortgage decree and one in that of a simple money decree at one time did not therefore affect the court-sale evidenced by Exhibits XVIII but is in fact in its favour. I have already shown that in suits for money, it is competent to the Court to make a decree creating a charge on immoveable property in respect of the debt sued on, if the parties would so desire and I could not allow plaintiff's contention that the decree Exhibit F was erroneous in that it directed sale of the zamindari. Exhibits XIV (*a*) and XV (*b*) are copies of *razinamahs* presented to Court by the plaintiffs therein and by plaintiff's father in the suits therein contained and the Courts found the *razinamahs* to have been properly made and ordered them to be filed—Exhibits XVI (*b*) and XV (*c*). The orders of Courts for filing the *razinamahs* used to take the place of a judicial award on the debt and the question of the validity of the debt could not be entered upon afterwards. This was formerly the law as is seen from Sloan's Code, page 1050, which further shows that if the Court were not satisfied, it could refuse to order the filing of the *razinamah*. The debt on which the decree Exhibit F was passed was thus unassailable and further I have already shown that plaintiff has failed to prove that it had been contracted by his father for illegal or immoral purposes. That debt was also an antecedent debt and in these circumstances the court-sale in question should be held to have passed the full proprietary interest of the property sold under it.

"Plaintiff contends, however, that according to what was understood to be the law at the time of the court-sale in question, ancient and impartible zamindaris were inalienable, that this court-sale was not therefore intended to operate as an outright sale of the zamindari but to create a title in the purchaser only to enjoy the zamindari during the natural life of plaintiff's father, and that what was in fact sold was only such a limited right of enjoyment until the death of plaintiff's father.

(1) (1856) I.L.R., 9 Mad., 424. (2) (1898) I.L.R., 11 Mad., 64.

"As pointed out before, this Pavaly Zamin was one of the 72 *polliams* created by the Pandiyan Kingdom in the 16th century for rendering military service In *Naraganty Lutchmeedavamah* v. *Vengama Naidoo*(1) the nature of a *polliam* tenure in Madras was investigated and found to have been an ancestral estate of the nature of a Raj. 'Although it belonged to an undivided family, yet it was not subject to partition. It could be held only by one member of the family called the Polligar who was, however, bound to maintain the other members of the undivided family out of the *polliam*. Succession to the *polliam* estate was determined by primogeniture. The Madras Regulation XXV of 1802 only vested in all zamindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them. *It recognizes the right of private property* and does not assert a right on the part of Government to deprive or dispossess zamindars in their lifetime or their heirs after their deaths, for the purpose of transferring their rights to the Government or to the new holders at the will of the Government, independent of any considerations connected with the realization of revenue. The object of the Regulation was only the protection of the revenue from invalid grants and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon Government any title which it did not then possess.' By the Istimirar Sannad (Exhibit A) this Pavaly *Polliam* became a zamindari which is permanently settled. By long usage or custom this zamindari became an impartible zamindari, but on this ground it did not become inalienable.

"In support of his contention that a zamindari like the one in question was held to be inalienable by the Madras High Court about the time the court sale under Exhibit XVIII was made, plaintiff relies upon the certain rulings of the late Sadar Court and of the Madras High Court reported in the earlier volumes. Those rulings proceeded upon the construction of the Regulation XXV of 1802 aforesaid and held that 'improper alienations to the prejudice of the rights of the Government or of the successor to the estate are voidable on the determination of the interest of the person who makes them.' They are collected and given in

(1) (1861) 9 M.I.A., 66

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abandon such distinction—*vide Narasanna* v. *Gurrappa*(1) and *Kunhali Beari* v. *Keshava Shanbaga*(2).

"In the present case the decree Exhibit F was passed for sale of this zamindari, treating the decrees Exhibits XIV (*a*) and XIV (*b*) and XV (*c*) on which it is passed as decrees made on hypothecation of the zamindari. The distinction that used to be drawn by our High Court between a sale in execution of a mortgage decree and one in that of a simple money decree at one time did not therefore affect the court-sale evidenced by Exhibits XVIII but is in fact in its favour. I have already shown that in suits for money, it is competent to the Court to make a decree creating a charge on immoveable property in respect of the debt sued on, if the parties would so desire and I could not allow plaintiff's contention that the decree Exhibit F was erroneous in that it directed sale of the zamindari. Exhibits XIV (*a*) and XV (*b*) are copies of *razinamahs* presented to Court by the plaintiffs therein and by plaintiff's father in the suits therein contained and the Courts found the *razinamahs* to have been properly made and ordered them to be filed—Exhibits XVI (*b*) and XV (*c*). The orders of Courts for filing the *razinamahs* used to take the place of a judicial award on the debt and the question of the validity of the debt could not be entered upon afterwards. This was formerly the law as is seen from Sloan's Code, page 1050, which further shows that if the Court were not satisfied, it could refuse to order the filing of the *razinamah*. The debt on which the decree Exhibit F was passed was thus unassailable and further I have already shown that plaintiff has failed to prove that it had been contracted by his father for illegal or immoral purposes. That debt was also an antecedent debt and in these circumstances the court-sale in question should be held to have passed the full proprietary interest of the property sold under it.

"Plaintiff contends, however, that according to what was understood to be the law at the time of the court-sale in question, ancient and impartible zamindaris were inalienable, that this court-sale was not therefore intended to operate as an outright sale of the zamindari but to create a title in the purchaser only to enjoy the zamindari during the natural life of plaintiff's father, and that what was in fact sold was only such a limited right of enjoyment until the death of plaintiff's father.

(1) (1880) I.L.R., 9 Mad., 424. (2) (1898) I.L.R., 11 Mad., 64.

may be with such restrictions as spring from the peculiar character of his ownership, and that those powers fall short of a right of absolute alienation of the estate.' This is really bringing the right of a zamindar to deal with the zamindari to almost the same level as that of the manager of an ordinary Hindu family to deal with the family property *Gavuridevamma Gāru* v *Rāmandora Gāru*(1) was an appeal of 1867 but was decided in October 1870 and what plaintiff contends is that until that ruling was passed the law applicable to zamindaris was understood to be that the permanent settlements made by the Government with zamindars created only a life estate in them with remainder to his heirs and successors in perpetuity *Chintalapati Chinna Simhadriraj* v *The Zamindar of Vizianagram*(2) in which the above ruling was given proceeded as stated before upon a construction of the Regulation XXV of 1802 which construction was expressed to be erroneous by Justice HOLLOWAY in *Ramasheshaiya Panday* v. *Bhagavat Panday*(3). A question of the same nature was before the Privy Council and was decided by that Board in 1861 in which they construed the Regulation in the same manner as Justice HOLLOWAY did in the ruling abovementioned · *vide Vencataswara Yettiapah Naicker v. Alagoo Moottoo Servagaren*(4). In the next case *Kondappa Naik* v. *Annamalay Chetty*(5), the High Court expressed their regret for their decision in *Ramasheshaiya Panday* v *Bhagavat Panday*(3) by stating that the ruling of the Privy Council in *Vencataswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren*(4) was not known to them or brought to their notice when they passed that decision. The material portion of the judgment of the Privy Council in the case aforesaid runs as follows —'The language of the Regulation would seem to apply to questions between the *zamindar* and the Government, and to have been framed with a view of preventing a severance of the *zamindari* without public notice to the Government. It is not very obvious upon what principle it can be held that an instrument good against the party making it is bad against an heir, if the ancestor had an absolute power of alienation. If the successor is, as we should term it, a remainder man, or claiming by a title which the ancestor could not defeat,

(1) (1870) 6 M H C R., 93
(2) (1864) 2 M H.C R., 128.
(3) (1868) 3 M H C R, 5
(4) (1861) 8 M.I A, 327.
(5) (1869) 4 M.H.C.R., 396.

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the case, of course, is different.' This interpretation cuts the ground upon which the decision in *Chintalapati Chinna Simhadriraj* v. *The Zamindar of Vizianagram*(1) proceeded and it having been arrived at in 1861 by the Judicial Committee of the Privy Council, we could not hold the ruling in the Madras case to be an authority as the judicial understanding of the law when the zamin in question was sold in 1869.

"The law governing the Hindus in this Presidency is the Mitakshara Law which applies to zamindari families equally with the families owning properties subject to the incidents of partition. In a Hindu family, usage however outweighs written text of law and if established it will supersede the general law which, however, regulates all beyond the custom. In zamindari families succession by primogeniture is regulated according to usage and excepting this peculiarity, general principles of the Mitakshara Law govern them also—*vide* *Katama Natchiar* v. *The Raja of Shivagunga*(2), *Srimut Raja Moottoo Vijaya Raganadha Bodha Gooroo Swamy Periya Odaya Tevar* v. *Katama Natchiar, Zamindar of Shivagunga*(3). *Baboo Beer Pertab Sahee* v. *Maharajah Rajendro Pertab Sahee*(4), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*(5), *Uddoy Adittya Deb* v. *Jadublall Adittya Deb*(6), *Ram Nundun Singh* v. *Janki Koer*(7), *Gavuridévamma Gáru* v. *Rāmandora Gáru*(8), which refers to *Baboo Beer Pertab Sahee* v. *Maharajah Rajendro Pertab Sahee*(4), it is held that a zamindari is property belonging to all the members of the family. The distinction between an ordinary coparcenary property and an impartible property is pointed out in *Naraganti Achammagaru* v. *Virupatchan Nambudripad*(9), which also lays down that in both there is the unity of co-ownership, as well as an obligation to maintain co-parceners and to preserve the *corpus* of the estate The *ratio decidendi* from all the above rulings is that impartible and undivided partible estates are alike the family property of members in a state of non-division.

"The above was the position of the holder of an impartible estate and alienations made by him used to be contested by his

(1) (1864) 2 M.H.C.R., 128.
(2) (1863) 9 M.I.A., 543 at p. 593.
(3) (1866) 11 M.I A., 50.
(4) (1867) 12 M.I.A., 1 at p. 18.
(5) (1869) 12 M.I A., 523 at p. 542.
(6) (1880) I.L.R., 5 Calc, 113.
(7) (1902) I.L.R., 29 Calc, 828.
(8) (1870) 6 M.H. C.R., 93
(9) (1892) I.L.R., 4 Mad., 250.

successor on various grounds in certain instances, some of which were also taken to the judicial committee of the Privy Council. The earliest decision on the point was passed in 1830—*vide Mulraz Lachmia* v. *Chalekany Vencata Rama Jagganadha Row* (1) wherein it was held that a zamindar having no male issue was entitled to alienate a portion of the zamindari. The next in point of time was decided in 1849 in which it was held that a zamindar could make an alienation in favour of his illegitimate son—Sloan's Code, 84, edition of 1862 A permanent lease made by a zamindar was upheld against his successor in 1861 in *Vencataswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren*(2). In the same volume there is the ruling reported in *Chetty Colum Comara Vencatachella Reddyer* v. *Rajah Rungasawmy Streemunth Jyengar Bahadoor*(3), which has an important bearing to the present case A zamindar had contracted some debts and on his death his widow paid them off by borrowing from another individual. The claim of the last creditor to recover the debt from the zamindariwas opposed by the adopted son of the deceased debtor zamindar, but the Judicial Committee held that the zamindari in the hands of the adopted son was liable for such debts In *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam*(4), it was held that debts contracted by the widow of a zamindar to discharge her husband's debts were binding on the reversioner and this decision was passed in 1867. In *Udaiya Tevar* v. *Katama Natchiar*(5), it was held that a zamindar was entitled to make alienations under the Regulation XXV of 1802 A zamindar made a permanent lease of a portion of the zamindari and the High Court upheld the same binding on his successor, *Kondappa Naik* v. *Annamalay Chetty*(6), and these rulings were passed in 1869. The rulings aforesaid negative the plaintiff's contention that until 1870 the Courts of Justice were holding the [zamindar as possessing only a life estate in him in the zamindari with remainder to his heirs and successors in perpetuity.

"There have also been various cases of alienations of zamindaris in this and the adjoining district from long before the court sale of the zamin in question and most of them were never questioned by the successor. The earliest on record is a

(1) (1838) 2 M.I.A., 54.
(2) (1861) 8 M.I.A., 327.
(3) (1861) 8 M.I.A., 319
(4) (1867) 11 M.I.A., 619.
(5) (1864) 2 M.H.C.R., 131 at p. 143.
(6) (1869) 4 M.H.C.R., 396 at p. 463.

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court-sale of a Zamindari in the Coimbatore district in 1841." [The Subordinate Judge here discussed such cases as were proved in evidence.]

"The zamindari families being governed by the principles of Mitakshara Law except in point of succession by primogeniture and the zamindaris treated as the property of the joint family, the principle of Hindu Law enunciated in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1) that a son is bound to pay off his father's debts unless contracted by the latter for illegal or immoral purposes should be held to govern a case like the present. That principle was enunciated so long ago as 1856 and has since been followed by the various High Courts in India. As pointed out by *Narasanna* v. *Gurappa*(2) in a case of this kind, what we have to see in the first instance is what the bargain was and whether it related to the whole estate or only to the alienor's share, and if it were found that it comprised the whole estate, we should then go into the immorality or illegality of the debt if that were alleged by the son as a ground to avoid the alienation as against him, *vide* also *Ponnappa Pillai* v. *Pappuvāyyangar*(3), *Gangulu* v. *Ancha Bapulu*(4), *Gopālsami Pillai* v. *Chokalingam Pillai*(5), *Velliyammal* v. *Katha*(6), *Srinivása* v. *Yelaya*(7), *Kunhali Beari* v. *Keshava Shanbaga*(8), *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan*(9), *Nanomi Babuasin* v. *Modhun Mohun*(10), *Bhagbut Pershad Singh* v. *Girja Koer*(11), *Mahabir Pershad* v. *Moheswar Nath Sahai*(12), *Sadáshiv Joshi* v. *Dinkar Joshi*(13), *Cooverji Hirji* v. *Dewsey*(14). In the present case the court-sale evidenced by Exhibit XVIII comprising the zamindari as a whole and plaintiff failing to show that the debt which gave rise to the court-sale had been contracted by his father for illegal or immoral purposes, it must be found that the sale is binding on him, following the ruling of the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall*(15). The present case is much stronger because the debt under Exhibit XIV was contracted by plaintiff's

(1) (1856) 6 M.I.A., 393
(2) (1886) I.L.R., 9 Mad., 424
(3) (1882) I.L.R., 4 Mad., 1
(4) (1882) I.L.R., 4 Mad., 73
(5) (1882) I.L.R., 4 Mad., 320
(6) (1882) I.L.R., 5 Mad., 61.
(7) (1882) I.L.R., 5 Mad., 251
(8) (1888) I.L.R., 11 Mad., 64.
(9) (1889) I.L.R., 12 Mad., 142 (P.C.)
(10) (1886) I.L.R., 13 Calc., 21 (P.C.)
(11) (1888) I.L.R., 15 Calc., 717 (P.C.)
(12) (1890) I.L.R., 17 Calc., 584 (P.C.).
(13) (1882) I.L.R., 6 Bom., 520
(14) (1893) I.L.R., 17 Bom., 718
(15) (1874) L.R., 1, I.A., 321.

father to prevent a sale of a good portion of the zamindari then imminent and to pay off a mortgage debt and other debts directed by Courts to be realized from sale-proceeds of the zamindari. The ruling of the Privy Council in *Muttayan* v. *Zamindār of Sivagiri*(1), is exactly in point. There the transaction was dated 1867 and on it a suit was brought in which a *razinamah* was entered into between the parties and ordered to be filed by the Court in 1868. The son and successors of the zamindar impeaching the alienation held in execution of that decree, the Privy Council held that a zamindari was not exempted from payment of father's debts. This was an appeal from the decision of the Madras High Court reported in *Muttayan Chetti* v. *Sivagiri Zamindār*(2), wherein the High Court had held that the ruling in *Girdharee Lall* v. *Kantoo Lall*(3), could not be applied in this Presidency as it would upset the long course of decisions uniform from 1818 and that the pious duty of sons could not be extended to polygars, because sons are not able to protect their interest by partition. But the Privy Council would not agree to those propositions but ruled that the suit should be governed by the doctrine laid down in *Girdharee Lall* v. *Kantoo Lall*(3), as it was not new but old and that the zamindaris are assets in the hands of sons for payment of their father's debts. The present case is analogous to that ruling and plaintiff could not get over it, *vide* also the Bagalur case *Veera Soorappa Nayani* v. *Errappa Naidu*(4), wherein the alienations impeached were made in 1868 and before."

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C. V. Ananthakrishna Ayyar for appellant.

K. Srinivasa Ayyangar for respondents.

S. Srinivasa Ayyangar and *A. Krishnaswamy Ayyar* for first respondent.

MILLER, J.—I agree with the judgment which my learned Colleague has prepared and will now deliver.

MILLER, J.

ABDUR RAHIM, J.—The appellant as plaintiff in the suit seeks to recover the Pavali zamin, a small impartible zamindari which belonged to his ancestors and was sold in 1869 at a court auction during the life-time of his father and purchased by one Chidambaram Chettiar, the first defendant's father. It was in execution of a decree obtained by Chidambaram Chettiar himself in a suit (Original Suit No. 10 of 1866) that the sale

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(1) (1883) I.L.R., 6 Mad., 1 (P.C.)
(2) (1879) I.L.R., 3 Mad., 370
(3) (1874) L.R. 1 I.A., 321.
(4) (1906) I.L.R., 29 Mad., 484.

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took place. The plaintiff's father died on 24th January 1894 and the present suit was instituted on 23rd January 1906 just on the last day of the 12 years since the plaintiff's father's death. The Subordinate Judge having found on the main issues on the merits against the plaintiff dismissed the suit. By the third issue the plaintiff raised the contention that the zamindari in question was inalienable by custom but the finding of the Subordinate Judge on this point which is against the plaintiff has not been contested before us. It could not be and has not been disputed that the debts to satisfy which the sale took place were binding on the last zamindar, and, as the alleged custom of inalienability has not been established, there can be no doubt that the zamindari of which the plaintiff's father was the full owner according to the law as well settled in this Presidency by the Pittapur case *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(1) following the decision in *Sartaj Kuari* v. *Deoraj Kuari*(2), was liable to be sold absolutely in execution of the first defendant's father's decree. The whole of the argument, therefore, addressed to us by the learned vakil for the appellant is concentrated on the question—what was in fact sold under the decree? He contends that what was sold was not the entire proprietry interest of the zamindar which he actually possessed in the zamindari but a mere life interest. The argument is that the decisions of this Court showed that the law as interpreted in this Presidency up to 1869 was that an impartible zamindari was inalienable except during the zamindar's life and as under the sale certificate 'the right, title and interest' of the plaintiff's father was the subject of sale, we must presume that what was intended to be sold and was in fact sold was the Zamindar's life interest. He has also contended that the debts embodied in the decree in Original Suit No. 10 of 1866 have not been proved to have been incurred for proper or necessary purposes and that the doctrine that a Hindu son was liable for the debts of his father which were not shown to have been incurred for illegal or immoral purposes had no vogue in this Presidency until 1881, *i.e.*, long after the sale in question in this case—when a Full Bench of this Court in *Ponnappa Pillai* v. *Pappuvayyangar*(3) held that the principle of the Privy Council ruling in *Girdharee Lall* v. *Kantoo Lall*(4) was applicable.

(1) (1899) I.L.R., 22 Mad., 383.
(2) (1888) I.L.R., 10 All., 272 (P.C.)
(3) (1882) I.L.R., 4 Mad., 1.
(4) (1874) L.R., 1 I.A., 321.

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In dealing with these contentions we must bear in mind that as pointed out in *Abdul Aziz Khan* v. *Appayasami Naicker*(1) the question what the Court intended to sell and what the purchaser understood that he bought, is one of fact or rather of mixed law and fact and must be determined according to the evidence in the particular case, and as observed in *Veerabadra Aiyar* v. *Marudaga Nachiar*(2) in investigating this question the Court is not confined to any one fact. What is to be gathered from the numerous decisions on the subject, which are summarised in the lastmentioned case, is that the character of the debt, the terms of the sale certificate which formed the contract of the parties, the law as interpreted at the time of the sale, the frame of the suit, the judgment and decree, the execution proceedings, the advertisements for sale, the adequacy or inadequacy of the purchase money and the conduct of the parties are all circumstances which may legitimately be considered in an inquiry of this nature and no single circumstance can be regarded as conclusive by itself.

As regards the state of the law in this Presidency in 1869 it was undoubtedly held by the Courts that a holder of an impartible zamindari was not its full owner and did not possess absolute powers of alienation. This interpretation of the law prevailed down to 1889 when in *Beresford* v. *Ramasubba* (3) MUTHUSAMI AYYAR and WILKINSON, JJ, felt themselves bound by the ruling of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari*(4) which laid down the law otherwise. But it is not shown to have been the law in this Presidency that the zamindari for the time being had no powers of alienation in any circumstances, that is to say, he had not the same powers of disposition over the *corpus* of the estate as the head of an ordinary joint Hindu family governed by the Mitakshara. In *Beresford* v. *Ramasubba*(3), the learned Judges observe: "Thus, the principle which has hitherto guided the Courts in this Presidency as supported by the observations of the Judicial Committee has been this—that when an estate is shown to be impartible by custom, the general law is superseded only to the extent of excluding the right of partition and of joint enjoyment, and the *Mitakshara*

(1) (1904) I.L.R., 27 Mad., 131 at p. 142.
(2) (1911) I.L.R., 34 Mad., 188 at pp. 205 and 206.
(3) (1890) I.L.R., 13 Mad., 197 at p. 204. (4) (1880) I.L.R., 10 All., 272 (P.C.).

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law governs the disposing power of the co-parcener in sole possession over the corpus *of the estate.* But this view was overruled by the Privy Council in the case of *Sartaj Kuari* v. *Deoraj Kuari*(1)." When the applicability of the decision in *Sartaj Kuari* v. *Deoraj Kuari*(1) was questioned before the Judicial Committee of the Privy Council in the Pittapur case *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(2) on the ground that in the Madras Presidency a general custom of inalienability of impartible zamindaris existed apart from the law of the Mitakshara as evidenced by a long series of decisions, their Lordships reviewed all the cases down to *Singjee* v. *Tiruvengadam*(3) and came to the conclusion that "this custom now relied upon did not modify the law. It had no force independently of the law." In commenting on the prior decisions of the Madras High Court *Rajah Enooganty Sooriah* v. *Rajah Venkata Neeladry Rao*(4), *Visiasu Ramaya* v. *Vahidally Beg*(5), *Sre Sre Ramachandra Sur Harishendana* v. *Jaganada Gajapati Narayana Deo*(6), *Subbarayulu Nāyak* v. *Rāma Reddi*(7), *Malaiaraya Nayanar* v. *Oppāyi Ammal*(8), *Nārāyana Devu* v. *Harischendana Devu*(9), *Chintalapati Chinna Simhadriraj* v. *The Zamindār of Vizianagram*(10), *Gavuridevamma Garu* v. *Rámandora Garu*(11) and *Pareyasami* v. *Saluckai Tevar*(12) all of which except the last two cases proceeded upon the terms of Regulation XXV of 1802, their Lordships, with reference to the view expressed by HOLLOWAY, J., in *Chintalapati Chinna Simhadriraj* v *The Zamindar of Viziangram* (10), upon which much reliance has been placed by the learned vakil for the appellant as showing that the law at the time was that a zamindar had no power of alienation beyond his life time, observe:—"In that it was held by the High Court of Madras that the *ratio decidendi* of all the cases down to the two latest clearly was that a zamindar under the permanent settlement had really an estate analogous to an estate tail as it originally stood upon the Statute *de Donis.* This was introducing into the law of the Madras Province what is said in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (13) *to be 'a novel mode of inheritance, inconsistent with the*

(1) (1888) I.L.R., 10 All., 272 (P.C.).
(2) (1899) I.L.R., 22 Mad., 383 (P.C.).
(3) (1890) I.L.R., 13 Mad., 102.
(4) (1834) 3 Knapp, 27 (Notes).
(5) (1819) Mad. Dec. (Sud. Ad.), 51.
(6) (1861) Mad. Dec. (Sud. Ad.), 163.
(7) (1863) 1 M.H.C.R., 141.
(8) (1863) 1 M.H.C.R., 319.
(9) (1863) 1 M.H.C.R., 455.
(10) (1864) 2 M.H.C.R., 128.
(11) (1870) 6 M.H.C.R., 93 at p. 150.
(12) (1875) 8 M.H.C.R., 157.
(13) (1872) L.R., I.A., Sup. Vol., 47 at p. 74.

Hindu law'." These observations of the Judicial Committee are conclusive to show that the law of the presidency was not even in the earlier days that a zamindar's estate was analogous to an estate tail as it originally stood upon the Statute *de Donis*, as was wrongly stated in the case reported in *Chintalapati Chinna Simhadriraj* v. *The Zamindār of Vizianagram*(1). Besides, neither in that nor any other decision of that period as I read them does it appear to have been held that apart from the enactment embodied in Regulation XXV of 1802 a zamindar holding an impartible zamindari could not for legitimate family or other necessary purpose make an alienation binding upon his successor. On the other hand in *Gavuridēvamma Garu* v. *Rāmandora Garu*(2), what was laid down with reference to impartible zamindaris was, "the unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property, but the mode of its beneficial enjoyment is different" and in *Pareyasami* v. *Saluckai Tevar*(3), it was distinctly stated that "he (the zamindar) should be regarded as possessing only the qualified powers of disposition of a member of a joint family with such further powers, or it may be with such restrictions as spring from the peculiar character of his ownership, and that these powers fall short of a right of absolute alienation of the estate." Then as to what is the exact nature of a zamindar's estate in an inalienable zamindari according to those decisions the Judicial Committee observed that there was a remarkable divergence of views in those judgments which deprived them of much authority. See the Pittapore case *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(4). In *Abdul Aziz Khan* v. *Appayasami Naicker*(5), the Judicial Committee [was again called upon to declare what was the law in Madras with respect to impartible zamindaris before 1889 and they say "As regards the law of the matter in 1873 and 1876, when the sales took place, it was the accepted law in Madras that the holder of an impartible zamindari who was himself a member of an undivided family, could not alienate or encumber the corpus of the estate so as to bind his co parceners except for justifiable especial causes. Prior to 1889, there had been a

(1) (1864) 2 M H.C.R., 128 (2) (1870) 6 M H.C R., 93 at p 105.
(3) (1875) 8 M.H C.R, 157 at p. 177. (4) (1899) I L R, 22 Mad, 383 at p. 395.
(5) (1904) I L R, 27 Mad, 131 at p. 142 (P.C).

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series of decisions to this effect in the Madras Courts, but in that year, following the judgment of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari*(1) the High Court of Madras overruled those decisions [*Beresford* v. *Ramasubba*(2)]." This leaves no room for doubt in the matter, but it is suggested on behalf of the appellant that their Lordships' statement refers to the period between 1869 and 1873 and not to the state of law in 1869. It is however clear that the Judicial Committee did not mean to confine the scope of their observations to that period and that there is nothing to support this suggestion that there was a radical difference in the interpretation of the law during that period and what preceded it, to the effect that up to 1869 the law was that a zamindar of an impartible zamindari in this Presidency could not according to the Hindu law alienate the *corpus* of the estate even for such causes as would justify an alienation by the manager of a joint family and that the law was the reverse of this since 1869. The decision of the High Court in *Gavuridēvamma Garu* v. *Rāmandora Garu*(3), was in 1870 and if that was not quite in accord with the cases *Subbarayulu Nayak* v. *Rama Reddi*(4), *Malaıaraya Nayanar* v. *Oppāyi Ammal*(5), *Nārāyana Devu* v. *Harischendena Devu*(6), and *Chintalapati Chinna Simhadriraj* v. *The Zamindār of Vizianagram*(7), all that could be said was that there was "divergence of views about that period as to the rights generally of a holder of a zamindari and not that it was the established interpretation of the law in 1869 that he could not make an alienation even for justifiable especial causes." The proper conclusion, then, as already stated, is that in 1869 the law was that the zamindar was not possessed of absolute powers of disposition over the *corpus*, but that apart from the necessity of conforming to the requirements of any special regulation such as Regulation XXV of 1802, he was like any other head of a co-parcenary, competent to bind the estate by debts incurred or alienations made for purposes which are regarded by the Mitakshara law as proper and justifiable. It is then contended that in any case in 1869 the law in this Presidency was not that a Hindu son was bound to pay his father's debts unless

(1) (1888) I.L.R., 10 All., 272 (P.C.)
(2) (1890) I.L.R., 13 Mad., 197.
(3) (1870) 6 M.H.C.R., 93.
(4) (1863) 1 M.H.C.R., 141.
(5) (1863) 1 M.H.C.R., 349.
(6) (1863) 1 M.H.C.R., 435.
(7) (1864) 2 M.H.C.R., 128

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he could show that they were incurred for illegal or immoral purposes and that this proposition established by *Girdharee Lall* v. *Kantoo Lall*(1) in 1874 was not adopted in Madras until the Full Bench decision in *Ponnappa Pillai* v. *Pappuvāyyangar*(2). The Privy Council had to consider this question in the Sivagiri case *Muttayan* v. *Zamindār of Sivagiri*(3) and there their Lordships observe that the doctrine laid down in *Girdharee Lall* v. *Kantoo Lall*(1) was not new but supported by previous decisions and they held that there was no ground for the opinion that that case did not apply to the Madras Presidency. And when one looks to the judgment of the learned Judges in the Full Bench case in *Ponnappa Pillai* v. *Pappuvayyangar*(2) I do not think that it can be said to be clearly made out that the law in this Presidency was recognised by the courts to be different from what is stated to be the law in *Girdharee Lall* v. *Kantoo Lall*(1). In *Ponnappa Pillai* v. *Pappuvāyyangar*(2) the Chief Justice TURNER observes that he did not "understand the other learned Judges who felt themselves unable to accept the law declared by the Privy Council to assert the existence of any immemorial usage at variance with the law" and points out that no ruling of the Madras Court to the contrary was cited at the bar except a decision of Mr. Justice MUTHUSWAMI AYYAR which was then under appeal to the Privy Council That is the case it may be mentioned which was the subject of decision in *Muttayan* v. *Zamindar of Sivagiri*(3) already referred to. No doubt Mr. Justice KINDERSLY said that the cases of *Girdharee Lall* v. *Kantoo Lall*(1) and *Nanomi Babuasin* v. *Modhun Mohan*(4), appeared to imply that the son was responsible for his father's debt even in the life-time of the father and that this doctrine was new to this part of India. However that may be he does not say that the doctrine that the son was under obligation to pay his father's debt after the latter's death was not recognised in this Presidency. In any case even Mr. Justice KINDERSLY does not lay down that the law respecting the liability of a Hindu son for his father's debt was different here from that which obtained in the other Presidencies, and he points out that for many years there had been no decision here directly on the point. And in fact no decision had been cited to us which laid down the law

(1) (1874) L.R., 1 I.A., 321.
(2) (1882) I.L.R., 4 Mad., 1 at p. 52.
(3) (1883) I.L.R., 6 Mad., 1 (P.C.).
(4) (1886) I.L.R., 13 Calc., 21 (P.C.).

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otherwise than as enunciated in *Girdharee Lall v. Kantoo Lall*(1) at the time of the sale in question in this present case. Further when the father occupies the position of the manager of the family and in this case the plaintiff's father had at least that status if not something higher, the essential difference in the law with respect to the liability of the son as a co parcener for his debts and that of any other co parcener relates substantially to the onus of proof. In the case of the son the burden is on him of showing that the debt was incurred for illegal or immoral purposes while in the case of the other co parcener the creditor has got to prove that the debt was incurred for proper or necessary purposes. It is not necessary to determine in this case apart from the onus of proof the exact nature of the difference between a debt or alienation which is not shown to have been incurred or made for illegal or immoral purposes and a debt or alienation which is proved to have been contracted or made for a proper or necessary purpose, because I have come to the conclusion that the debts which were paid off by money borrowed under Exhibit XIV were incurred by the plaintiff's father for necessary purposes. What I wish to point out here is that the doctrine enunciated in *Girdharee Lall* v. *Kantoo Lall*(1) in so far as we are concerned with it in this case is one relating to the question of onus of proof, and such a question is obviously one to be determined only at the time of trial; so even if it were the fact that at the time of the sale of this zamindari the onus was upon the alienee to make out that the alienation was made for a binding purpose that cannot affect the way in which the matter was to be tried at the date of this suit.

The most important point for consideration in the case is whether the finding of the Subordinate Judge that the debts which ultimately led to the sale of the zamindari were *incurred for necessary and proper purposes is correct.* I have come to the conclusion that it is The Subordinate Judge has exhaustively dealt with the matter in paragraphs 19 to 56 of his judgment and I do not consider it necessary to enter into any details. The clear outstanding facts are that the plaintiff's father at the very outset had to incur the expenses of a heavy litigation to secure possession of the zamindari and for that purpose contracted debts of a very large amount, and when he

(1) (1874) L.R., 1 I.A., 321.

did at last recover the zamindari he apparently recovered very little—if anything at all in the shape of mesne profits. As a result of the suit for possession he had to grant long lease of it for a very small rent. Then he either instituted other suits himself or had to defend suits instituted by other persons and the expenses of all these suits along with the expenditure on the occasion of marriages in the family including his own after his first wife's death, and those of his brother and daughter considerably swelled the debts he had to incur at the very beginning of his career. These debts are proved by bond and *razinamah* decrees passed on bonds executed by him to the different creditors. All the papers connected with those decrees are not available at this distant date, but as found by the Subordinate Judge, there is evidence, as I have already stated, showing that the debts were borrowed under pressure of necessity. At the date of Exhibit XIV which is a simple bond executed on the 18th August 1863 in favour of Venkatachalam Chettiar, by the plaintiff's father the debts amounted to Rs. 49,000, and it was with this sum for which Exhibit XIV was executed that the previous debts were discharged. It is suggested that the plaintiff's father was not right in instituting or defending many of the suits in which he was engaged and which ultimately resulted in decrees against him. But in the first place the materials before us do not enable us to come to any definite conclusion on the point; and in the next place if the plaintiff's father unwisely or imprudently engaged in certain litigations, or if he was somewhat extravagant in expenditure in connection with the marriages, that is to say, if the debts most of which were evidenced by *razinamah* decrees were to any extent the result of imprudence or mismanagement it could not be said that Venkatachalam Chettiar, the predecessor in title of the present defendants, who advanced the money to discharge those debts was under an obligation to inquire to what extent the debts could by proper management have been avoided if as there can be no doubt those debts constituted a pressing demand which had to be met. It has not been shown that the zamindar could have paid off his liabilities out of the income of the zamindari. In the usual course of procedure in those days a *razinamah* decree was obtained on Exhibit XIV, by which the zamindari was mortgaged to the plaintiff for Rs. 51,000 odd which included a sum of Rs. 1,715 for interest

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and costs in addition to the sum of Rs. 49,000 mentioned in Exhibit XIV. The plaintiff attempted to show that his father was addicted to vices and that some of the debts at any rate were incurred for making large presents to nautch girls and in connection with cock and ram fights. But I agree with the Subordinate Judge that, though it is possible that the plaintiff's father's character was not all that was desirable there is really no evidence to connect his debts with necessities arising out of vicious immoral indulgences. In this connection I may say that the estimate of the Subordinate Judge of the income and value of the property is not shown to be wrong. That matter is dealt with in paragraphs 63 and 64 of the judgment. The finding of the Subordinate Judge that the net income of the zamindari at the time of the sale in 1869 was not more than about Rs. 5,500 is amply justified by the evidence and is not in fact seriously challenged. The zamindari was sold for Rs. 97,000, and having regard to the fact that lands have since then gone up very much in value and the prices obtained at the time for similar lands in zamindaris in the neighbourhood there can be no doubt that that figure would represent the proper value of the full and absolute interest in the zamindari supposing that was what was sold. Now the debts having been incurred for necessary purposes and the law at the time being that the absolute interest in the zamindari was liable to be sold for such debts, the only question is what was in fact sold. The sale price as I have said was equal to the full value of the zamindari and the sale took place in execution of a mortgage decree by which the entire zamin was liable to be sold and not merely an interest terminable with the life of zamindar, and if we look at the proceedings in execution they also show that it was the absolute interest in the zamin that was put up for sale, as is apparent from accounts of attachment and sale proclamation Exhibits XVII and XVIIa. With regard to the oral evidence on the plaintiff's side as to what is alleged to have been said of the officers of the Court and other persons at the time of the sale, there can be no doubt that the Subordinate Judge was right in refusing to act upon it.

Much reliance is placed by the learned pleader for the appellant upon the fact that the sale certificate Exhibit XVIII mentions that the right, title and interest of the defendant in this suit in the zamindari is sold as indicating that only his life interest was sold. It has been repeatedly pointed out that such a description

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is not inconsistent in any way with the sale of all the interest which the debtor had power to dispose of under given circumstances. See *Abdul Aziz Khan* v *Appayasami Naicker*(1). I may also mention that it is proved by evidence that in 1869 apart from the decision of the Courts sale of zamindari lands was not in fact confined merely to an interest terminable with the life of the zamindar for the time being. Then we have it that the debts which led to the sale were incurred for necessary purposes and the *corpus* of the zamindari was liable to be sold for such debts in 1869 when the sale actually took place. By the *razinamah* decree passed on the bond (Exhibit XIV) by which the previous debts were paid off the absolute interest in the zamindari was hypothecated and made liable to sale. The execution proceedings show that such interest and not merely an interest limited to the life of the zamindar was attached and notified for sale and the price paid was the full value of the zamindari supposing that the absolute interest in it was sold. These facts are to my mind conclusive to show that what was in fact sold was the entire interest in the zamindari. It is not therefore necessary to consider whether section 373 of the Civil Procedure Code would be a bar to the suit because, the plaintiff had instituted in his father's life-time another suit asking for a declaration that the sale did not affect his interest, and when withdrawing the suit he did not obtain permission of the Court to institute another suit. But I may say that in my opinion the present suit is based on a substantially different cause of action, the plaintiff being now, if his allegations were made out, entitled to possession of the zamindari while in the life-time of his father his only interest was a mere chance of succession. I am doubtful if such interest was sufficient to sustain the suit though I do not express any definite opinion on the point.

The judgment of the learned Subordinate Judge must be confirmed and the appeal dismissed with costs.

(1) (1904) I.L.R., 27 Mad., 131 at p. 141.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. July 26, and August 2.

RAGHUNATHA CHARIAR (PLAINTIFF), APPELLANT,

v.

SADAGOPA CHARIAR (DEFENDENT), RESPONDENT.*

Right of suit—Transfer of property in consideration of transferee paying sums to third parties—Failure of transferee to pay in reasonable time—Right of transferor to sue for sums irrespective of damage.

A transfers his property to *B* in consideration of *B* agreeing to pay certain sums to third persons

A is himself entitled to sue *B* for the recovery of those sums as if they are due to him in case of *B*'s failure to pay the third persons within a reasonable time, and *A* is not in such a case bound to show that he was in any way dammified by *B*'s failure

Dorasinga Tevar v. *Arunachalam Chetti*, [(1900) I.L.R., 23 Mad., 441], *Ranganadham Pantulu* v *Appala Naidu* [C.M.A. No 119 of 1908 (unreported)], and *Gopala Aiayar* v. *Ramaswami Sastrigal* [S.A. No. 133 of 1907 (unreported)], followed.

Siva Subramania Mudaliar v. *Gnanasambanda Pandara Sannadhi* [(1911) 21 M.L.J., 359], *Chenchuramayya* v. *Subbaramayya* [(1911) 9 M.L.T., 79], *Doraisami Tevar* v *Lakshmanan Chetty* [(1904) 14 M.L.J., 285], *Thanjammai Nachiar* v. *Subbammal* [(1906) 16 M.L.J., 20], *Putti Naravanamurthy Ayyar* v. *Marimuthu Pillai* [(1903) I.L.R., 26 Mad., 322], *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee* [(1899) I.L.R., 26 Calc., 241] and *Musammat Izzat un Nissa Begam* v *Kunwar Pertab Singh* [(1909) I.L.R., 36 I.A., 203], distinguished

Subba Naidu v. *Bathula Bee Bee Sahiba* [(1910) 8 M.L.T., 188], referred to.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tanjore, in Appeal No. 760 of 1908, presented against the decree of K. S. LAKSHMI NARASAIYAR, the District Munsif of Valangiman, in Original Suit No. 212 of 1907.

The facts of this case are fully set out in the judgment.

The Hon. Mr. *P. S. Sivaswami Ayyar*, Advocate-General, and *T. Ranga Ramanujachariar* for the appellant.

S. Srinivasa Ayyangar and *N. R. K. Thathachariar* for the respondent.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

JUDGMENT.—In this case the plaintiff instituted a suit for the recovery from the defendant of a sum of money which the latter had agreed to pay to two persons Alamelu Ammall and Srinivasa

* Second Appeal No. 233 of 1910.

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Gopalachariar as consideration for the transfer to him by the plaintiff of two decrees in Original Suits Nos. 61 and 62 of 1902 in the District Munsif's Court of Valangiman. The plaintiff alleged that the defendant failed to pay the amounts due to the two persons named above and that he himself had to pay them. The contract of assignment was dated 28th January 1904, and this suit was instituted on the 16th July 1907. The amount due to the said two persons was *in fact paid by the plaintiff's brother* and not by the plaintiff himself The plaint alleged that the plaintiff had made good the amount to his brother by some adjustment with him. Both the Lower Courts have disbelieved the adjustment and dismissed the suit holding that the plaintiff has no cause of action to recover the amount as he has not yet sustained any damage by the defendant's breach of his contract. The defendant also raised the contention that the assignment of the decrees in Original Suits Nos. 61 and 62 of 1902 was brought about by fraud on the part of the plaintiff and that the consideration of the assignment subsequently failed. But these questions have now been set at rest and have not been argued before us.

The main contention in this appeal by the plaintiff is that the nature of the plaintiff's right against the defendant has been misunderstood and that the Lower Courts have wrongly proceeded on the footing that the defendant's obligation under the contract (Exhibit A) was to indemnify the plaintiff against any claims by the two persons to whom he himself owed the debt, which the defendant had agreed to discharge under the contract. Mr S. Srinivasa Ayyangar who argued the case at great length for the respondent (defendant) argued that the defendant's obligation was to pay the consideration for the assignment to certain other persons than the plaintiff and that the plaintiff had no right to claim the amount himself in variance of the contract, and as he had not proved that he sustained any actual damage by the defendant's failure to perform the contract in the manner stipulated no decree could be passed in the plaintiff's favour. If we understood him aright, he also maintained that the plaintiff's right was only to be indemnified against his creditors' claims. We are by no means sure that the two contentions are not the same in substance though expressed in different forms. It is perfectly clear to us that the amount mentioned in the contract was agreed upon as consideration for

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the assignment of the decrees in the defendant's favour and the plaintiff is entitled to insist that the defendant should pay it in some form or other. It is no doubt conceivable and possible that an assignment of property may be made in consideration merely of the assignee agreeing to indemnify the assignor against some claim by a third party. But this is not the natural interpretation to be placed where the value of the property assigned is ascertained between the parties and the assignee is directed to pay that value to a third party. Such a direction is *primâ facie* intended for the benefit of the assignor. We think it would have been perfectly open to the plaintiff in this case to pay off his two creditors himself and to claim the payment of the consideration for the assignment direct to himself Where the assignee is himself interested in the payment being made to a third party, there might be reason to hold that the assignor could not alter the mode of payment prescribed by the assignment deed. It may also be conceded that when on the faith of the original direction the assignee has entered into direct relations with the third party and rendered himself liable to make the payment to him the assignor could no longer require the assignee to pay the consideration to himself. See *Siva Subramania Mudaliar* v. *Gnanasambanda Pandara Sannadhi*(1) to which one of us was a party and *Chenchuramayya* v. *Subbaramayya*(2). But these instances do not affect the general nature of the right possessed by a person who for a certain sum of money executes a conveyance in favour of another and agrees that the money should be paid to the third persons. In the decision in *Dorasinga Tevar* v. *Arunachalam Chetti*(3), with which we agree, SUBRAMANIA AYYAR and MOORE, J.J., held that where a person executes a lease to another and the lessee agrees in consideration thereof to discharge the debt due by the lessor to a third person but fails to do so within a reasonable time, the lessor is entitled to recover the amount although he has not paid the debt himself.

The same view was adopted in *Ranganadham Pantulu* v. *Appala Naidu*(4), to which one of us was a party and in *Dawant Singh* v. *Syed Shah Ramjan Ali*(5). It is also in accordance with the rule in England where a vendee of property makes a promise in

(1) (1911) 21 M.L.J., 359. (2) (1911) 9 M.L.T., 79.
(3) (1900) I.L.R., 23 Mad., 441. (4) C.M.A. No. 119 of 1908 (unreported).
(5) (1907) 6 C.L.J., 398.

consideration of the sale to discharge certain encumbrances on the property sold. The judgment of BODDAM and BASHYAM AYYANGAR, JJ., in *Doraisami Tevar* v. *Lakshmanan Chetty*(1), does not support the respondent's contention. The suit there was not to recover the amount which the vendee had promised to pay to the vendor's creditor, but to recover as damages the amount for which the vendor had executed to his creditor a promissory-note on account of interest due to him for a period of one year in consequence of the vendee not having paid the amount immediately. There can be no doubt that the vendor was entitled only to recover the consideration for the sale which the vendee failed to pay to the former's creditor. He could not claim any further damages which he had not actually sustained *Thangammai Nachiar* v. *Subbammal*(2), decided by MOORE and SANKARAN NAIR, JJ, was a similar case, on the other hand in *Gopala Aiyar* v. *Ramasuami Sastrigal*(3) to which SANKARAN NAIR, J, was a party, *Doraisinga Tevar* v. *Arunachalam Chetti*(4) was followed. *Putti Narayanamurthi Ayyar* v *Marimuthu Pillai*(5) and *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee*(6), were suits for contribution and the plaintiff's right in such cases is undoubtedly only to recover the defendant's portion of the money actually paid by the plaintiff.

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The case on which the learned vakil for the respondent mainly relied was *Musammat Izzatt-un-Nissa Begam* v. *Kunwar Pertab Singh*(7). But, in our opinion, it affords him no help whatever. There a mortgagee in execution of a decree on his mortgage purchased the mortgagor's equity of redemption subject to two prior mortgages stated to be for certain sums. It afterwards turned out that those mortgages were valueless. The mortgagor sued to recover from the mortgagee-purchaser the amount stated in the sale certificate as the value of those mortgages The Judicial Committee held that the claim was unsustainable. According to Their Lordships' view what was sold was the equity of redemption of the mortgagor. The fact that it turned out to be more valuable than it was supposed to be at the time of the auction sale could give no right of action to the mortgagor.

(1) (1904) 14 M L.J., 285.
(2) (1906) 16 M L.J , 20.
(3) S A. No. 183 of 1907 (unreported).
(4) (1900) I.L.R., 23 Mad , 441.
(5) (1903) I.L R , 26 Mad , 322.
(6) (1899) I.L.R., 26 Calc., 241.
(7) (1909) L R., 36 I.A., 203 at p. 208.

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They observed: "On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property."

It is perfectly clear that the Judicial Committee was dealing with a case where a vendee pays a certain price for the equity of redemption and agrees to indemnify the vendor against the claims of the incumbrances, and not one where he agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to incumbrancers. Their Lordships observe that in such a case an express promise to discharge incumbrances against which the purchaser covenants to indemnify the vendor, does not change the nature of the vendor's right which is only to be indemnified against certain claims, and not to have certain sums of money belonging to him paid to another.

For these reasons we are of opinion that the plaintiff is entitled to recover the amount which the defendant agreed to pay to third parties. Mr. Srinivasa Ayyangar invites us to refer the question for decision to a Full Bench, contending that the cases of *Doraisami Tevar* v. *Lakshmanany Chett*(1) and of *Thangammai Nachiar* v. *Subbammal*(2), are in conflict with *Dorasinga Tevar* v. *Arunachalam Chetti*(3), and draws attention to the observation of MILLER, J., in *Subba Naidu* v. *Bathula Bee Bee Sahiba*(4), that there is such conflict. But we do not think for the reasons already mentioned by us that there is any real conflict of authority and we must decline to accede to his request.

It is next contended that as the debts due to the plaintiff's creditors have been actually paid by the plaintiff's brother and

(1) (1904) 14 M.L.J., 285.
(2) (1903) 16 M.L.J., 20.
(3) (1900) I.L.R., 23 Mad., 441.
(4) (1910) 8 M.L.T., 158.

as there is nothing to show that the brother could or would proceed against him, the plaintiff ought not to be given a decree. It is not clear to us that the plaintiff's brother would not be entitled to proceed against him. Assuming, however, that he could not that does not effect the plaintiff's right in the view we have expressed above.

We must finally refer to another contention of Mr. Srinivasa Ayyangar, that the defendant had difficulties in executing the decrees which were assigned to him and that he could not be held to be guilty of default in the payment of the money which he agreed to pay. There is in our opinion no substance in this argument. The defendant's contract was to pay the consideration for the assignment to the two persons referred to above and he was bound to do so within a reasonable time. Moreover it was he himself who tried to repudiate the assignment on grounds which were found to be unsustainable.

The plaintiff is entitled to a decree for the sum of Rs 1,375 with interest at six per cent. from the date of plaint to this date and further interest at the same rate. The defendant must pay the plaintiff's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

1911. July 21, 26 and 27 and August 3.

T. VENKATACHALA REDDI (PLAINTIFF), APPELLANT,

v

T. RANGIAH REDDI AND THREE OTHERS (DEFENDANTS Nos. 1 TO 4), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sch. II, para 17—Agreement to refer to arbitration a pending litigation, privately, not coming under—Order filing agreement—Appeal, maintainability of—Civil Procedure Code (Act V of 1908), Order 23, rule 3—Mere agreement is not an adjustment under.

An order of a court filing an agreement to arbitrate presented by the parties to a suit is a decree and is appealable as such even under the old Civil Procedure Code (Act XIV of 1882), as well as under section 104 (*d*) of the new Code.

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* Civil Miscellaneous Appeal No 22 of 1910.

RAGHUNATHA v. SADAGOPA.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

They observed: "On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property."

It is perfectly clear that the Judicial Committee was dealing with a case where a vendee pays a certain price for the equity of redemption and agrees to indemnify the vendor against the claims of the incumbrances, and not one where he agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to incumbrancers. Their Lordships observe that in such a case an express promise to discharge incumbrances against which the purchaser covenants to indemnify the vendor, does not change the nature of the vendor's right which is only to be indemnified against certain claims, and not to have certain sums of money belonging to him paid to another.

For these reasons we are of opinion that the plaintiff is entitled to recover the amount which the defendant agreed to pay to third parties. Mr. Srinivasa Ayyangar invites us to refer the question for decision to a Full Bench, contending that the cases of *Doraisami Tevar* v. *Lakshmanany Chetti*(1) and of *Thangammai Nachiar* v. *Subbammal*(2), are in conflict with *Dorasinga Tevar* v. *Arunachalam Chetti*(3), and draws attention to the observation of MILLER, J., in *Subba Naidu* v. *Bathula Bee Bee Sahiba*(4), that there is such conflict. But we do not think for the reasons already mentioned by us that there is any real conflict of authority and we must decline to accede to his request.

It is next contended that as the debts due to the plaintiff's creditors have been actually paid by the plaintiff's brother and

(1) (1901) 14 M.L.J., 285.
(2) (1903) 16 M.L.J., 20.
(3) (1900) I.L.R., 23 Mad., 441.
(4) (1910) 8 M.L.T., 188.

as there is nothing to show that the brother could or would proceed against him, the plaintiff ought not to be given a decree. It is not clear to us that the plaintiff's brother would not be entitled to proceed against him. Assuming, however, that he could not that does not effect the plaintiff's right in the view we have expressed above.

We must finally refer to another contention of Mr. Srinivasa Ayyangar, that the defendant had difficulties in executing the decrees which were assigned to him and that he could not be held to be guilty of default in the payment of the money which he agreed to pay. There is in our opinion no substance in this argument. The defendant's contract was to pay the consideration for the assignment to the two persons referred to above and he was bound to do so within a reasonable time Moreover it was he himself who tried to repudiate the assignment on grounds which were found to be unsustainable.

The plaintiff is entitled to a decree for the sum of Rs. 1,375 with interest at six per cent from the date of plaint to this date and further interest at the same rate. The defendant must pay the plaintiff's costs throughout

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

1911. July 21, 26 and 27 and August 3

T. VENKATACHALA REDDI (PLAINTIFF), APPELLANT,

v

T. RANGIAH REDDI AND THREE OTHERS (DEFENDANTS NOS. 1 TO 4), RESPONDENTS *

Civil Procedure Code (Act V of 1908), sch II, para 17—Agreement to refer to arbitration a pending litigation, privately, not coming under—Order filing agreement—Appeal, maintainability of—Civil Procedure Code (Act V of 1908), Order 23, rule 3—Mere agreement is not an adjustment under.

An order of a court filing an agreement to arbitrate presented by the parties to a suit is a decree and is appealable as such even under the old Civil Procedure Code (Act XIV of 1882), as well as under section 104 (*d*) of the new Code.

* Civil Miscellaneous Appeal No 22 of 1910.

VENKATACHALA v. RANGIAH.

Ghulam Khan v. *Muhammad Hassan* [(1902) I.L.R., 29 Calc., 167 (P.C.)], *Surya Narayana Rao* v. *Siralaich* [(1911) 21 M.L.J., 263] and *Thiruvengadathiengar* v. *Vaidiratha Ayyar*, [(1906) I.L.R., 29 Mad., 3 3], followed.

Paragraph 17 of the second schedule to Civil Procedure Code (*Act V of* 1908) corresponding to section 523, Civil Procedure Code (*Act XIV of* 1882), covers only cases where parties without having recourse to litigation agree to refer their differences to arbitration. So an agreement to refer to arbitration a pending litigation made without the intervention of the court cannot be filed under paragraph 17 of the second schedule.

Ghulam Khan v. *Muhammad Hassan* [(1902) I.L.R., 29 Calc., 167 (P.C.)] and *Tincowry Dey* v. *Fakir Chand Dey* [(1903) I.L.R., 30 Calc., 218], followed.

A mere agreement to refer to arbitration a matter pending before a court cannot be treated as an adjustment of the dispute under Order 23, rule 3, corresponding to section 375, Civil Procedure Code (Act XIV of 1882), though an award consequent on the arbitration may be so treated.

MACLEAN, C.J.'s view in *Tincowry Dey* v. *Fakir Chand Dey* [(1903) I.L.R., 30 Calc., 218], followed.

Pragdas v. *Girdhardas* [(1902) I.L.R., 26 Bom., 76], *Brojodurlabh Sahu* v. *Ramanath Ghose* [(1897) I.L.R., 24 Calc., 908] and *Lakshmana Chetti* v. *Chinnathambi Chetti* [(1901) I.L.R., 24 Mad., 326], distinguished.

APPEAL against the order of MANAVEDAN RAJA, the District Judge of North Arcot, in Miscellaneous Petition No. 491 of 1908 (in Original Suit No. 8 of 1907).

In this suit which was for partition the District Judge held that an agreement to refer to arbitration the subject-matter of the suit was a bar to the further progress of the suit and ordered the agreement to be filed. Plaintiff who opposed the petition to file the agreement appeals.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

The Hon. Mr. *T. V. Seshagiri Ayyar* and *S. Gopalaswami Ayyangar* for the respondents.

AYLING AND SPENCER, JJ.

JUDGMENT.—This is an appeal against an order of the District Judge of North Arcot under schedule II, paragraph 17, Civil Procedure Code, filing an agreement to arbitrate presented by certain parties to Original Suit No. 8 of 1907 on his file, and making an order of reference thereon.

The learned vakil for respondent took the preliminary objection that under the old Civil Procedure Code no appeal lay against such an order and that although the order was passed after the new code came into force yet inasmuch as the application to file was presented under the old Code, section 104 (*d*) of the new Code cannot be given retrospective effect.

It is unnecessary to discuss the somewhat knotty point involved in the latter part of this contention, inasmuch as we are clearly of opinion that there was a right of appeal even under the old Code. This is laid down by Their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(1), which has been followed by a Full Bench of this Court in *Surya Narayana Rao* v. *Sarabaiah*(2) and also in *Thiruvengadathiengar* v. *Vaidinatha Ayyar*(3). This latter case deals with an order filing an award under section 525 of the old Code of Civil Procedure (paragraph 20 of schedule II) but orders on such an application and on an application under section 523 (paragraph 17 of schedule II) are dealt with on the same footing by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(1), and the opinion is expressed that the order in each case is a decree If a decree, it is indisputably appealable. This disposes of the preliminary objection. Passing to the merits of the appeal the chief objection taken to the order of the District Judge is that as the proposed arbitration related to the subject-matter of the suit then pending between the parties to the agreement the latter does not come within the scope of paragraph 17 and should not have been ordered to be filed. This objection was taken before the District Judge but overruled.

It should be stated that the application cannot be treated as one under paragraph 1 (old Code of Civil Procedure, section 505) inasmuch as the plaintiff did not join in it. We have simply to determine whether it is covered by paragraph 17

As pointed out by the learned District Judge there has been a direct difference of opinion on this point between the Allahabad and Bombay High Courts on the one hand and the Calcutta High Court on the other, but all doubt as to which view should prevail is dispelled by the decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(1) (which has been already quoted in another connection) We cannot follow the District Judge in his statement that the Privy Council gives no distinct opinion as to the applicability of section 523, when there is a pending litigation. Their Lordships of the Privy Council in their judgment very carefully analyse the provisions relating to

(1) (1902) I L R, 29 Calc, 167 (P C) (2) (1911) 21 M L J, 263
(3) (1906) I L R, 29 Mad, 303

VENKATACHALA v. RANGIAH. AYLING AND SPENCER, JJ.

arbitrations and classify arbitrations under three heads numbered I, II and III. A comparison of this analysis with the words of the old Code leaves no doubt whatever that these three heads corresponded to arbitrations initiated by applications under sections 506, 523 and 525 respectively. Head II is defined to cover cases where parties *without having recourse to litigation* agree to refer their differences to arbitration. . . . It is not suggested that paragraph No 17 is any wider in scope than section 523.

We think there can be no doubt whatever of the meaning of the Privy Council's exposition of the law and it has been interpreted in precisely the same way by the Calcutta High Court in *Tincowry Dey* v. *Fakir Chand Dey*(1). It is just as applicable to the new schedule II as to the provisions of the old Code and is in our opinion, conclusive of the question.

It is suggested on behalf of the respondent that even if paragraph 17 of schedule II be held inapplicable, the application and agreement may be dealt with under Order 23, rule 3, and treated as an adjustment of the suit. This is entirely a new suggestion and it is clear that neither the parties to the petition nor the court itself in disposing of it ever contemplated that it should be dealt with under the rule in question or under section 375 of the old Code which corresponds to it. Respondent's vakil relies on the rulings reported in *Pragdas* v. *Girdhardas*(2), *Brojodurlabh Sinha* v. *Ramanath Ghose*(3) and *Lakshmana Chetti* v. *Chinnathambi Chetti*(4). The Calcutta case [*Brojodurlabh Sinha* v. *Ramanath Ghose*(3)] deals with an ordinary agreement to settle the matter in dispute without reference to arbitration. In both the other cases the basis of the adjustment was not only an agreement to refer to arbitration, but also an award of arbitrators consequent thereon. No doubt an agreement to refer coupled with the award resulting from the reference may be treated as an adjustment: but can a simple agreement to refer be so treated? We are of opinion that it cannot; this is the view taken by MACLEAN, C.J., in *Tincowry Dey* v. *Fakir Chand Dey*(1). It is true that the other two Judges in that case hesitated to concur in the opinion of MACLEAN, C.J., that a simple agreement to refer could under no circumstances

(1) (1903) I.L.R., 30 Calc., 218.
(2) (1902) I.L.R., 26 Bom., 76.
(3) (1897) I.L.R., 24 Calc., 908.
(4) (1901) I.L.R., 24 Mad., 326.

be treated as an adjustment under section 375. They did not however express an adverse opinion and the reasoning of HILL, J. (in which STEVENS, J., concurred) for refusing to accept the agreement in that case as an adjustment applies with equal force to the present case. In *Rukhanbai* v. *Adamji Shaik Rajbhai*(1), BEAMAN, J., took the same view as MACLEAN, C.J., in *Tincowry Dey* v. *Fakir Chand Dey*(2) observing that mere submission to arbitration was not an adjustment of a suit but only a step towards it We are clearly of opinion that the agreement to refer in this case cannot be treated as an adjustment under Order 23, rule 3.

VENKATACHALA v. RANGIAH. AYLING AND SPENCER, JJ.

The order of the District Judge will be set aside with costs in both courts.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr Justice Ayling

A. BUDRUDEEN AND ANOTHER (RESPONDENTS DEFENDANTS), APPELLANTS,

v

GULAM MOIDEEN AND ANOTHER (PETITIONERS PLAINTIFFS), RESPONDENTS.*

1911. September 13

Civil Procedure Code (Act XIV of 1882), sec 231 [Order XXI, rule 15, Civil Procedure Code (Act V of 1908)]—Execution application by one only of the decree-holders, maintainability of—Section 258, Civil Procedure Code (Act XIV of 1882) [Order XXI, rule 2, Civil Procedure Code (Act V of 1908)]—Uncertified adjustment, not recognizable by court executing the decree—Judgment-debtor's counter-petition, equivalent to application if within time

Under section 258, Civil Procedure Code (Act XIV of 1882), corresponding to Order XXI, rule 2 of Civil Procedure Code (Act V of 1908), a payment or adjustment of a decree cannot be recognized by any court executing the decree unless the same has been certified in the manner allowed by law The clause is applicable where in answer to an application for execution an adjustment is set up by the judgment-debtor. *Gadadhar Panda* v. *Shyam Churn Naik* [(1908) 12 C W.N., 485], referred to

Though a judgment debtor's counter petition may be treated as an application to certify, the same cannot be allowed in the absence of any fraud, if it is made beyond 90 days of the adjustment

Ganapathy Ayyar v *Chenga Reddi* [(1906) I L R, 29 Mad, 312], *Veerappa Chettiar* v *Arumugam Poosari* [(1907) 17 M L J, 527] and *Periaamls Udayan* v. *Vellaia Goundan* [(1898) I L R, 21 Mad, 409], followed

Ramayyar v. *Ramayyar* [(1898) I L R, 21 Mad, 356, distinguished and commented on

(1) (1909) I L R., 33 Bom., 69 (2) (1903) I L R, 30 Calc, 218

* Civil Miscellaneous Appeal No 67 of 1909

BUDRUDEEN v. GULAM MOIDEEN.

Gangadhar Panda v. *Shyam Churn Naik* [(1908) 12 C.W.N., 485], distinguished.

HEATON, J.'s judgment in *Trimback* v *Hari Laxman* [(1910) 12 Bom. L.R., 686], not followed.

Under section 231, Civil Procedure Code (Act XIV of 1882), corresponding to Order XXI, rule 15, Civil Procedure Code (Act V of 1908), execution in favour of one only of the several decree-holders cannot be allowed unless there is sufficient cause to do so; when so allowed it is the duty of the Court to pass such orders as it deems necessary for protecting the interests of the persons who have not joined in the application

APPEAL against the order of K. C. MANAVEDAN RAJA, the District Judge of North Arcot, dated 24th March 1909, in Civil Miscellaneous Petition No. 60 of 1907 in Original Suit No. 24 of 1901.

This was an application, dated 28th October 1907, under sections 231 and 235, Civil Procedure Code (Act XIV of 1882), praying that the sum of Rs. 2,122 may be recovered in execution.

The judgment of the District Judge was as follows:—"Following the decisions in *Ganapathy Ayyar* v. *Chenga Reddi*(1) and *Veerappa Chettiar* v. *Arumugam Poosari*(2) I must hold that the alleged adjustment cannot be pleaded in bar in execution. Execution will proceed."

The other facts appear in the following judgment of the High Court The judgment-debtors appealed.

T R Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellants.

T Anantachariar for the respondents.

SUNDARA AYYAR AND AYLING, JJ.

JUDGMENT.—This is an appeal against the order of the District Court of North Arcot, on an application to execute the decree of that Court in Original Suit No. 24 of 1901. The application was put in by one only of the two plaintiffs in the suit. The judgment-debtors' defendants in their counter-petition contended that a sum of Rs 3,400 was paid to the two plaintiffs in complete satisfaction of the whole decree, the balance of the amount due to them (plaintiffs) being remitted in defendants' favour. They urged that the two plaintiffs had agreed to certify complete satisfaction of the decree to the Court and subsequently represented to the first defendant that they had done so; that the application for execution of the decree was therefore a fraudulent one and should not be allowed by the Court. They also contended that execution should not be allowed in favour of the

(1) (1906) I.L.R., 29 Mad., 312. (2) (1907) 17 M.L.J., 827.

applicant alone as he was only one of the two decree-holders in the suit. The District Judge was of opinion that he could not recognize the adjustment as it was not certified to the Court. He does not deal in his order with the other objection that execution should not be allowed in favour of one of the decree-holders alone.

The judgment-debtors' vakil has argued two points. First, that notwithstanding the absence of any certificate of satisfaction, the District Judge was bound to enquire whether, as a matter of fact, the decree had been adjusted between the parties or not; and secondly, that the Judge was wrong in allowing execution in favour of the applicant alone and that he had failed to consider the objection. We are of opinion that the first contention cannot be supported. Section 258 of the old Procedure Code corresponding to Order XXI, rule 2 of the present Code lays down that unless such a payment or adjustment has been certified as aforesaid it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree. When an adjustment has been made it is no doubt the duty of the decree-holder to certify the adjustment to the Court; if he fails to certify, it is open to the judgment-debtor to take steps to compel him to do so and the law allows him 90 days within which to take such steps The adjustment in the present case was in the year 1904. The application for execution was in August 1907. In their counter-petition the judgment-debtors do not state that they were prevented from knowing of the fraudulent conduct of the plaintiffs by any fraud on their part until within 90 days before the date of their application. Section 258, clause 3, is imperative that the executing Court cannot recognize an adjustment which has not been certified. The clause is certainly applicable where in answer to an application for execution an adjustment is set up by the judgment-debtor. See *Gadadhar Panda* v. *Shyam Churn Naik*(1) In many cases the failure to certify would be fraudulent, but notwithstanding the fraud the executing Court is bound not to recognize the adjustment. The alleged misrepresentation that it had been certified in this case does not alter the position

We have been invited by the learned vakil for the appellants to treat the judgment-debtors' counter-petition as an

(1) (1908) 12 C.W.N., 485

BUDRUDEEN v. GULAM MOIDEEN. SUNDARA AYYAR AND AYLING, JJ.

such orders as it deems necessary for protecting the interests of the persons who have not joined in the application.

It is contended for the respondents that the second plaintiff did not appear though notice was issued to him on the first plaintiff's application and that we must take it that the Judge did consider his objection and held that this was a fit case for allowing execution in favour of one of the two decree-holders we are unable to uphold this argument. The judgment of the Lower Court does not show that the Judge being aware of the discretion vested in him by section 231 intended to exercise it in favour of the applicant after considering the circumstances of the case.

We must therefore reverse the order of the District Judge and remand the execution petition to him for fresh disposal according to law in the light of the above observations. The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911 September 13

VEERAIYAN CHETTIAR AND ANOTHER (PLAINTIFFS), PETITIONERS,

v.

PONNUSAMI CHETTIAR (DEFENDANT), RESPONDENT.*

Negotiable Instrument in favour of A as agent of B—Endorsement by A, simpliciter to C—No primâ facie title in C.

If a negotiable instrument executed in favour of "*A*, as the agent of *B*" is endorsed by *A*, *simpliciter* (i.e., without describing himself as the agent of *B*) to *C*, the endorsement cannot, in the absence of any evidence to show that *A* was intended to be the beneficial owner of the note, convey, in this country, any title to *C* so as to enable *C* to sue the person or persons liable on the note

Muthar Sahib Maraikar v. Kadir Sahib Maraikar [(1905) I.L.R., 28 Mad., 544], referred to

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of V. K. DESIKA CHARIAR, the Subordinate Judge of Negapatam, in Small Cause Suit No. 1108 of 1909.

The facts of this case are set out in the judgment.

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* Civil Revision Petition No. 816 of 1909.

VEERAIYAN v. PONNUSAMI.

SUNDARA AYYAR AND AYLING, JJ.

V. Ryru Nambiar for the appellants.

M. K. Narayanaswami Ayyar for the respondent.

JUDGMENT.—We are asked in this application to revise the judgment of the Subordinate Judge's Court of Negapatam in a Small Cause suit instituted by the endorsee of a negotiable promissory-note against the maker. The note was executed by the latter in favour of "Chella Muppanar Avargal, Agent of P. Sn. Picha Muppanar Avargal . . . ." The endorsement in favour of the plaintiff is signed merely "Chella Muppanar.". The defendant contended that the note was executed in favour of Chella Muppanar in his character as agent of Picha Muppanar and that the endorsement by him in his individual capacity and not as agent of Picha Muppanar would not entitle the plaintiff to maintain the suit. The Subordinate Judge upheld this contention He construed the note as one executed in favour of Chella Muppanar as agent of Picha Muppanar, that is, really in favour of Picha Muppanar

The question we have to decide is whether his construction is right. The argument before us is that the description is not conclusive to show that the note was made in favour of Chella Muppanar as agent of another person. This contention may be right, but the learned vakil for the petitioner is unable to say that his client wished to tender any evidence to show that Chella Muppanar was the beneficial owner of the promissory-note. We are not prepared to say, in the absence of any evidence to the contrary, that the Subordinate Judge was not justified in construing the note in the manner he did. It has no doubt been held in some English cases that a person who makes a note signing it as "director of a company" would not by that fact alone exclude his own personal liability and that even the affixing of the seal of the Company in a corner of the note would not be sufficient to exclude his liability. Having regard to the habits of the people in this country, we are of opinion that the Subordinate Judge was justified in inferring that the description of Chella Muppanar as "agent of Picha Muppanar" was intended to denote the character in which the note was executed in his favour. *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*(1), only shows that parol evidence may be

(1) (1905) I.L.R., 28 Mad., 544.

BUDRUDEEN v. GULAM MOIDEEN. — SUNDARA AYYAR AND AYLING, JJ.

such orders as it deems necessary for protecting the interests of the persons who have not joined in the application.

It is contended for the respondents that the second plaintiff did not appear though notice was issued to him on the first plaintiff's application and that we must take it that the Judge did consider his objection and held that this was a fit case for allowing execution in favour of one of the two decree-holders we are unable to uphold this argument. The judgment of the Lower Court does not show that the Judge being aware of the discretion vested in him by section 231 intended to exercise it in favour of the applicant after considering the circumstances of the case.

We must therefore reverse the order of the District Judge and remand the execution petition to him for fresh disposal according to law in the light of the above observations. The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. September 13.

VEERAIYAN CHETTIAR AND ANOTHER (PLAINTIFFS), PETITIONERS,

v.

PONNUSAMI CHETTIAR (DEFENDANT), RESPONDENT.*

Negotiable Instrument in favour of A as agent of B—Endorsement by A, simpliciter to C—No primâ facie title in C.

If a negotiable instrument executed in favour of "*A*, as the agent of *B*" is endorsed by *A*, *simpliciter* (*i.e.*, without describing himself as the agent of *B*) to *C*, the endorsement cannot, in the absence of any evidence to show that *A* was intended to be the beneficial owner of the note, convey, in this country, any title to *C* so as to enable *C* to sue the person or persons liable on the note.

Muthar Sahib Maraikar v. Kadir Sahib Maraikar [(1905) I.L.R., 28 Mad., 544], referred to.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of V. K. DESIKA CHARIAR, the Subordinate Judge of Negapatam, in Small Cause Suit No. 1108 of 1909.

The facts of this case are set out in the judgment.

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* Civil Revision Petition No. 818 of 1909.

VEERAIYAN v. PONNUSAMI. SUNDARA AYYAR AND AYLING, JJ.

V. Ryru Nambiar for the appellants.

M. K. Narayanaswami Ayyar for the respondent.

JUDGMENT.—We are asked in this application to revise the judgment of the Subordinate Judge's Court of Negapatam in a Small Cause suit instituted by the endorsee of a negotiable promissory-note against the maker. The note was executed by the latter in favour of "Chella Muppanar Avargal, Agent of P. Sn. Picha Muppanar Avargal . . . ." The endorsement in favour of the plaintiff is signed merely "Chella Muppanar." The defendant contended that the note was executed in favour of Chella Muppanar in his character as agent of Picha Muppanar and that the endorsement by him in his individual capacity and not as agent of Picha Muppanar would not entitle the plaintiff to maintain the suit. The Subordinate Judge upheld this contention. He construed the note as one executed in favour of Chella Muppanar as agent of Picha Muppanar, that is, really in favour of Picha Muppanar.

The question we have to decide is whether his construction is right. The argument before us is that the description is not conclusive to show that the note was made in favour of Chella Muppanar as agent of another person. This contention may be right, but the learned vakil for the petitioner is unable to say that his client wished to tender any evidence to show that Chella Muppanar was the beneficial owner of the promissory-note We are not prepared to say, in the absence of any evidence to the contrary, that the Subordinate Judge was not justified in construing the note in the manner he did. It has no doubt been held in some English cases that a person who makes a note signing it as "director of a company" would not by that fact alone exclude his own personal liability and that even the affixing of the seal of the Company in a corner of the note would not be sufficient to exclude his liability. Having regard to the habits of the people in this country, we are of opinion that the Subordinate Judge was justified in inferring that the description of Chella Muppanar as "agent of Picha Muppanar" was intended to denote the character in which the note was executed in his favour. *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*(1), only shows that parol evidence may be

(1) (1905) I.L.R., 28 Mad., 544.

VEERAIYAN v. PONNUSAMI. —— SUNDARA AYYAR AND AYLING, JJ.

admitted to exclude such a construction. No case has been cited which lays down that the *primâ facie* inference in such a case must be taken to be that the note was executed for the benefit of the person described as agent of another.

We dismiss the petition with costs.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Phillips.

1911. September 21.

V. RAMADOS AND TWO OTHERS (DEFENDANTS), APPELLANTS,

v.

K. HANUMANTHA RAO (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sec. 539—Decree, effect of, for scheme under, bar to private rights—Specific Relief Act (I of 1877), sec 42, consequential relief—Suit for recovery of office of trustee and injunction substantially valued—Actual possession with tenants who were willing to pay to whomsoever was a trustee—Prayer for possession unnecessary.

Where the lands of a temple were in the actual possession of tenants who were willing to pay rent to whomsoever was the trustee, a suit which merely prays for the recovery of the office of trustee and for an injunction against the defendants who were in possession of the office, which injunction was valued at a substantial figure, viz, Rs 2,000, does not offend against the proviso to section 42 of the Specific Relief Act (I of 1877) as the plaintiff had asked for such possession as he could under the circumstances and as the possession of the tenants would not be adverse to the plaintiff after his recovery of office.

Kunj Bihari v Keshavlal Hiralal [(1904) I.L.R., 28 Bom., 567], followed.

Rathnasabapathi Pillai v Ramasami Aiyar [(1910) I.L.R., 33 Mad., 452], *Abdul Kadar v. Mahomed* [(1892) I L.R, 15 Mad, 15], *Narayanan v. Shankunni* [(1892) I L.R., 15 Mad., 255] and *Jagannatha Chariar v Rama Rayer* [(1905) I.L.R., 28 Mad., 238], distinguished

Subramanyan v. Paramasvaran [(1888) I.L.R, 11 Mad, 116] and *Jagadindra Nath Roy v. Hemanta Kumari Debi* [(1905) I.L.R., 32 Calc. 129 (P.C.)], referred to.

Where an office of trustee was held by the members of a certain family for nearly a hundred years and by nobody else the office must be held to be hereditary in that family.

Section 539, Civil Procedure Code (Act XIV of 1882), corresponding to section 92, Civil Procedure Code (Act V of 1908), is not applicable to a suit to enforce a private right such as an hereditary trusteeship of a certain family, and it is no bar to such a suit.

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* Appeal No 264 of 1909.

Budree Das Mukim v. *Chooni Lal Johurry* [(1906) I.L.R., 33 Calc., 789], referred to.

A scheme once settled by a court cannot be altered except by the court and then only on substantial grounds. *Attorney-General* v. *Worcester (Bishop)* [(1851) 9 Hare, 328], *In re Betton's Charity* (1908) 77 L J. Ch., 193], *Re Browne's Hospital* v. *Stamford* [(1889) 60 L T., 288] and *Re Seleford's Charity* [(1861) 5 L T., 488], followed.

A scheme framed under section 539, Civil Procedure Code, is binding on all (whether worshippers or not) including even one who might have claimed a hereditary trusteeship and have brought a suit to enforce such a right before the settlement of the scheme; and a decree framing a scheme is a bar to a suit by such a person, even though the denial of such a right of suit might act very prejudicially to his interests and even though his application to be made a party to the scheme suit might have been rejected.

Section 539 confers upon the courts in this country the same powers that the courts in England possessed at the time of its enactment, and the principles of English law are applicable

Prayag Doss Ji Varu, Mahant v. *Tirumala Srirangacharlavaru* [(1905) I.L R., 28 Mad., 319 at p 324], *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* [(1891) I L.R, 15 Bom, 612], *Annaji* v. *Narayan* [(1897) I.L R, 21 Bom, 556] and *Prayag Doss Ji Varu* v. *Tirumala Srirangacharla Varu*, [(1907) I L.R., 30 Mad., 138(P C)], referred to.

APPEAL against the decree of A. C. DUTT, the Acting District Judge of Kistna at Masulipatam, in Original Suit No. 32 of 1908.

The facts of this case are fully set out in the judgment.

The Hon. Mr. *P. S. Sivaswami Ayyar*, the Advocate-General and *T. Prakasam* for the appellants.

P. Nagabhushanam for the respondent.

WHITE, C.J., AND PHILLIPS, J.

JUDGMENT.—The plaintiff's suit is for a declaration that he is the rightful Dharmakarta of the plaint temple and for reinstatement in the office and also for an injunction restraining the defendants from interfering with him in that office. The plaintiff's father was dismissed from the office of Dharmakarta in 1902 and died in 1905. In 1903 a suit was filed by the first defendant and another under section 539, Civil Procedure Code, and a scheme of management was framed in December 1903 under which the defendants were appointed trustees of the temple (Original Suit No. 10 of 1903 in the District Court of Kistna). The plaintiff has filed this suit on attaining majority. In this appeal three points arise for determination.—

(1) Is the suit maintainable without a prayer for possession of the property belonging to the temple?

(2) Can the plaintiff bring this suit in view of the scheme framed under section 539, Civil Procedure Code?

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WHITE, C.J., AND PHILLIPS, J.

(3) Has plaintiff a hereditary right to the office of *Dharmakarta?*

No definite issue was framed on the first point as it was not specifically taken in the defendants' written statement but there is an issue (No. 9) "whether the plaint is properly stamped" which is said to cover this point. We think from the District Munsif's reference to the rulings in *Govindan Nambiar* v. *Krishnan Nambiar*(1) and *Sonachala* v. *Manika*(2), that his attention was chiefly directed to the question of stamp duty and not to the question of the maintainability of the suit, but the latter having been very definitely raised in appeal must now be decided. The Advocate-General for appellants contends that the ruling in *Rathnasabapathi Pillai* v. *Ramasami Aiyar*(3), passed since the decree appealed against concludes the question. We think however the present case is distinguishable. In *Rathnasabapathi Pillai* v. *Ramasami Aiyar*(3), the suit was for a declaration that the plaintiff's dismissal was invalid, for an injunction and for damages, the injunction being valued at a nominal sum of Rs. 10. In the present suit the plaintiff asks for reinstatement in office, that is, he sues for the office and for an injunction and values his relief at Rs. 2,600 which is a very substantial relief. He further states in his plaint that the temple properties are in the possession of tenants "who will pay the rents to whomsoever holds the office of Dharmakarta." This statement is not traversed in the written statement and must be accepted as correct. If therefore plaintiff gets possession of the office of Dharmakarta, the tenants will pay rent to him and the plaintiff will obtain all the possession to which he is entitled, *i.e.*, the right to collect rent. The cases relied on in *Rathnasabapathi Pillai* v. *Ramasami Aiyar*(3), *i.e.*, *Abdulkadar* v. *Mahomed*(4), *Narayanan* v *Shankunni*(5) and *Jagannatha Charry* v. *Rama Rayer* (6), can all be distinguished from the present case as in all those cases the possession of the property may be said to have been adverse to the plaintiff and would have continued to be adverse even after the plaintiff had obtained the declaration sued for. Here it is admitted that the lands are in possession

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(1) (1882) I.L.R., 4 Mad., 146. (2) (1885) I.L.R., 8 Mad., 516.
(3) (1910) I.L.R., 33 Mad., 452. (4) (1892) I.L.R., 15 Mad., 15.
(5) (1892) I.L.R., 15 Mad., 255. (6) (1905) I.L.R., 28 Mad., 238.

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of persons who are willing to pay rent to the plaintiff as soon as he recovers the office of Dharmakarta and consequently the success of his suit for the office will involve his recovery of the temple property so far as it is possible for such recovery to be obtained. In a similar case *Kunj Biharji* v. *Keshavlal Hiralal*(1), JENKINS, C.J., remarked "How would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up," and this is very applicable in the present case. The lands attached to a temple do not belong to the Dharmakarta who is merely the manager but belong to the temple or idol, the Privy Council having held that an idol may be regarded as a juridical person capable of holding property.—*Jagadindra Nath Roy* v. *Hemanta Kumari Debi*(2). If the plaintiff in this suit were to get a decree for possession of the office and also of the lands belonging to the temple, what possession of the lands could be given by the court other than what plaintiff will admittedly obtain on recovering the office, *i.e.*, the right to collect rent from the tenants in possession. Assuming also that the consequential relief referred to in section 42, Specific Relief Act, is a relief against the defendants in the suit and not against third parties—*vide* *Subramanyan* v. *Parameswaran*(3), the defendants in this suit could not give the plaintiff physical possession of the temple property as the physical possession is outstanding in the tenants. We think therefore that the proviso to section 42 is no bar to the present suit.

As regards the third question we think the Subordinate Judge's finding that the office of Dharmakarta is hereditary in the plaintiff's family is correct. Members of the plaintiff's family have held the office continuously since 1797 and there is no evidence that it was ever held by any other family. This is, we think, sufficient to prove the hereditary right which was in effect put forward in 1870 (Exhibit A) and does not seem to have been denied.

The only remaining question is whether the plaintiff can bring this suit in view of the scheme framed in Original Suit No. 10 of 1903.

(1) (1904) I.L.R., 28 Bom., 567 (2) (1905) I.L.R., 32 Calc., 129 (P.C.)
(3) (1888) I.L.R., 11 Mad., 116.

confer upon the Courts in this country the same power that the Courts in England possessed at the time of its enactment . . . That the High Court and the District Courts in this country to which the jurisdiction is confirmed possess the same practically unlimited jurisdiction as the Court of Chancery in matters relating to the administration of public charities, religious or otherwise was taken for granted in *Chintaman Bajaji Dev* v *Dhondo Ganesh Dev*(1) and *Annaji* v. *Narayan*(2). . ." This case went upon appeal to the Privy Council [see *Prayag Doss Ji Varu* v. *Tirumala Srirangacharla Varu*(3)], and no exception was taken to the above remarks in Their Lordships' judgments. We may take it therefore that Courts in India have the powers possessed by the Court of Chancery and we may apply the principles of English law in this case. In *Attorney-General* v. *Worcester (Bishop)*(4), it was held that schemes settled by Court are not altered except upon substantial grounds and in *In re Betton's Charity*(5), it was held that a scheme remains in force only until further order or the establishment of a new scheme. Provisions in schemes may also be varied such as the number of Governors [*Re Browne's Hospital* v. *Stamford*(6)] and in *In re Seheford's Charity*(7) it was held that a Court will not, upon the motion of one of the interested parties, alter a scheme which it has settled with the approval of the Attorney-General. The principle adopted is apparently that a scheme once settled by Court cannot be altered except by the Court and then only on substantial grounds. This would seem to preclude suits between parties to establish a private right which if established would interfere with a charitable scheme settled by Court. No doubt it seems a hardship that the plaintiff shall be precluded from seeking to establish his private right, for ordinarily every person can be granted the relief to which he is entitled, but this principle cannot override the claims of the public and a charitable scheme settled by Court must be considered to have been settled for the benefit of the public. We must hold therefore that the plaintiff cannot maintain the present suit against the trustees appointed under the scheme. The District Judge ought not to have refused the plaintiff's guardian's application to be made a

(1) (1891) I.L.R., 15 Bom., 612. (2) (1897) I L R, 21 Bom, 556.
(3) (1907) I L R., 30 Mad., 138(P.C) (4) (1851) 9 Hare, 328.
(5) (1908) 77 L.J., Ch., 193. (6) (1889) 60 L.T., 288.
(7) (1861) 5 L.T, 488.

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party to the scheme suit and the plaintiff may have been seriously prejudiced thereby. In any case his inclusion as a party would have finally decided his right to the trusteeship one way or the other. The erroneous order of the District Judge cannot however affect the plaintiff's right to sue and although it may be prejudicial to the plaintiff it cannot give him a right to sue which he otherwise would not have had. If plaintiff's present suit were decreed it would have the effect of very materially altering a scheme framed by the Court without impleading the other persons interested in the scheme and would be as inequitable towards them as the refusal to entertain the plaintiff's suit is to him. The plaintiff's only remedy, if any, would seem to be to induce the Collector to ask for a modification of the Court's scheme by taking action under section 539 or rather section 92 of the new Civil Procedure Code We therefore think that the plaintiff's suit is not maintainable in view of the scheme settled in Original Suit No 10 of 1903 and would in allowance of the Appeal dismiss this suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

1911, September 21, October 5 and 6.

KARUTHAPPA ROWTHAN (PLAINTIFF), APPELLANT,

v.

BAVA MOIDEEN SAHIB (DEFENDANT), RESPONDENT.*

Promissory-note or acknowledgment—Deed, construction of—Unconditional undertaking and the document styled as promissory-note.

It is no doubt true that the question whether an instrument is a promissory-note or not should be judged by the words used, and that the instrument must contain in words an unconditional undertaking to pay a sum of money, and it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money.

Held, that the following document wherein the executant not only made an unconditional undertaking to pay but also styled it a promissory-note was a promissory-note and not a mere recital of a liability, and as such was not admissible in evidence for want of a proper stamp.

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* Second Appeal No. 478 of 1910.

KARUTHAPPA ROWTHAN v. BAVA MOIDEEN SAHIB.

"Promissory-note executed on . . . in favour of . . . by . . . In the matter of the purchase of piece goods by me from your shop on this date, the sum found due by me as per patty (list) is Rs 600 . . . which sum I promise to you or to your order on demand with interest at 1¼ per cent. To this effect . . . "

Tirupathi Goundan v. *Rama Reddi* [(1898), I.L.R., 21 Mad., 49], *Govind* v. *Balwantrao* [(1898) I.L.R., 22 Bom., 986], *Horne* v. *Redfearn* [(1838) 4 Bing. (N.C.), 433] and *White* v. *North* [(1849) 3 Exch. Reports, 689], distinguished.

Morris v. *Lee* (92 E.R., 409), referred to

SECOND APPEAL against the decree of F. H. HAMNETT, the District Judge of Madura, in Appeal Suit No. 523 of 1909, presented against the decree of R. ANNASWAMI AYYAR, the District Munsif of Dindigul, in Original Suit No. 59 of 1909.

This was a suit on the above document executed in the Native State of Mysore to which was affixed a one-anna stamp of the Native State of Mysore, by the defendant to one M.K. who after coming into British India endorsed it to the plaintiff, without affixing a British one-anna stamp. The document bore only the Mysore stamp. The Munsif dismissed the suit holding that it was a promissory-note and that it was not duly stamped as soon as it came into British India into the hands of the plaintiff's transferor. Before the District Judge, on appeal, it was contended that it was not a promissory-note, but only a mere recital of a liability.

The District Judge holding it to be a promissory-note dismissed the appeal. Hence this Second Appeal by plaintiff.

The Hon. the Advocate-General, *T. R. Ramachandra Ayyar* and *T. R. Krishnaswami Ayyar* for the appellant.

T. Prakasam, *M. H. Hakim* and *K. N. Gopaul* for the respondent.

SUNDARA AYYAR AND PHILLIPS, JJ.

JUDGMENT.—We are clearly of opinion that Exhibit A is a promissory-note. It is called a promissory-note in the phraseology of the document. The executant states that he agreed on the date of the promissory-note to pay the amount of Rs. 600 found due on demand. The argument that it is not a promissory-note is based on the form of the sentence, which is that the amount which the executant agreed to pay on demand for the price of cloths purchased by him on the date of the document was Rs. 600; but we have got the important fact that the document begins with saying that it was the promissory-note executed by the executant in favour of the appellant's transferor. In

RAMADOS v. HANUMANTHA RAO.

WHITE, C.J., AND PHILLIPS, J.

party to the scheme suit and the plaintiff may have been seriously prejudiced thereby. In any case his inclusion as a party would have finally decided his right to the trusteeship one way or the other. The erroneous order of the District Judge cannot however affect the plaintiff's right to sue and although it may be prejudicial to the plaintiff it cannot give him a right to sue which he otherwise would not have had. If plaintiff's present suit were decreed it would have the effect of very materially altering a scheme framed by the Court without impleading the other persons interested in the scheme and would be as inequitable towards them as the refusal to entertain the plaintiff's suit is to him. The plaintiff's only remedy, if any, would seem to be to induce the Collector to ask for a modification of the Court's scheme by taking action under section 539 or rather section 92 of the new Civil Procedure Code We therefore think that the plaintiff's suit is not maintainable in view of the scheme settled in Original Suit No 10 of 1903 and would in allowance of the Appeal dismiss this suit with costs throughout.

APPELLATE CIVIL.

Before Mr Justice Sundara Ayyar and Mr. Justice Phillips.

1911. September 21, October 5 and 6

KARUTHAPPA ROWTHAN (PLAINTIFF), APPELLANT,

v.

BAVA MOIDEEN SAHIB (DEFENDANT), RESPONDENT.*

Promissory-note or acknowledgment—Deed, construction of—Unconditional undertaking and the document styled as promissory-note.

It is no doubt true that the question whether an instrument is a promissory-note or not should be judged by the words used, and that the instrument must contain in words an unconditional undertaking to pay a sum of money, and it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money.

Held, that the following document wherein the executant not only made an unconditional undertaking to pay but also styled it a promissory-note was a promissory-note and not a mere recital of a liability, and as such was not admissible in evidence for want of a proper stamp.

* Second Appeal No. 478 of 1910.

"Promissory-note executed on . . . in favour of . . . by . . .

In the matter of the purchase of piece-goods by me from your shop on this date, the sum found due by me as per patty (list) is Rs. 600 . . . which sum I promise to you or to your order on demand with interest at 1¼ per cent. To this effect . . ."

KARUPPANNA KOUNDAN v. RAYA MUHIDEEN SAHIB.

Tirupathi Goundan v. *Rama Reddi* [(1898), I.L.R., 21 Mad., 49], *Govind* v. *Balwantrao* [(1898) I.L.R., 22 Bom., 986], *Horne* v. *Redfearn* [(1838) 4 Bing. (N.C.), 433] and *White* v. *North* [(1849) 3 Exch. Reports, 689], distinguished.

Morris v. *Lee* (92 E.R., 409), referred to.

SECOND APPEAL against the decree of F. H. HAMNETT, the District Judge of Madura, in Appeal Suit No. 223 of 1909, presented against the decree of R. ANNASWAMI AYYAR, the District Munsif of Dindigul, in Original Suit No. 59 of 1909.

This was a suit on the above document executed in the Native State of Mysore to which was affixed a one-anna stamp of the Native State of Mysore, by the defendant to one M.K. who after coming into British India endorsed it to the plaintiff, without affixing a British one-anna stamp. The document bore only the Mysore stamp. The Munsif dismissed the suit holding that it was a promissory-note and that it was not duly stamped as soon as it came into British India into the hands of the plaintiff's transferor. Before the District Judge, on appeal, it was contended that it was not a promissory-note, but only a mere recital of a liability.

The District Judge holding it to be a promissory-note dismissed the appeal. Hence this Second Appeal by plaintiff.

The Hon. the Advocate-General, *T. R. Ramachandra Ayyar* and *T. R. Krishnaswami Ayyar* for the appellant.

T. Prakasam, *M. H. Hakim* and *K. N. Gopaul* for the respondent.

SUNDARA AYYAR AND PHILLIPS, JJ.

JUDGMENT.—We are clearly of opinion that Exhibit A is a promissory-note. It is called a promissory-note in the phraseology of the document. The executant states that he agreed on the date of the promissory-note to pay the amount of Rs. 600 found due on demand. The argument that it is not a promissory-note is based on the form of the sentence, which is that the amount which the executant agreed to pay on demand for the price of cloths purchased by him on the date of the document was Rs. 600; but we have got the important fact that the document begins with saying that it was the promissory-note executed by the executant in favour of the appellant's transferor. In

RAMADOS v. HANUMANTHA RAO.

WHITE, C.J., AND PHILLIPS, J.

party to the scheme suit and the plaintiff may have been seriously prejudiced thereby. In any case his inclusion as a party would have finally decided his right to the trusteeship one way or the other. The erroneous order of the District Judge cannot however affect the plaintiff's right to sue and although it may be prejudicial to the plaintiff it cannot give him a right to sue which he otherwise would not have had. If plaintiff's present suit were decreed it would have the effect of very materially altering a scheme framed by the Court without impleading the other persons interested in the scheme and would be as inequitable towards them as the refusal to entertain the plaintiff's suit is to him. The plaintiff's only remedy, if any, would seem to be to induce the Collector to ask for a modification of the Court's scheme by taking action under section 539 or rather section 92 of the new Civil Procedure Code We therefore think that the plaintiff's suit is not maintainable in view of the scheme settled in Original Suit No 10 of 1903 and would in allowance of the Appeal dismiss this suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

1911 September 21, October 5 and 6

KARUTHAPPA ROWTHAN (PLAINTIFF), APPELLANT,

v.

BAVA MOIDEEN SAHIB (DEFENDANT), RESPONDENT.*

Promissory-note or acknowledgment—Deed, construction of—Unconditional undertaking and the document styled as promissory-note.

It is no doubt true that the question whether an instrument is a promissory-note or not should be judged by the words used, and that the instrument must contain in words an *unconditional undertaking to pay a sum of money, and it is* not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money.

Held, that the following document wherein the executant not only made an unconditional undertaking to pay but also styled it a promissory-note was a promissory-note and not a mere recital of a liability, and as such was not admissible in evidence for want of a proper stamp.

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* Second Appeal No. 478 of 1910.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

C. HANUMANLU PANTULU (PLAINTIFF), APPELLANT,

1911. October 11 and 12

v

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT)(REPRESENTED BY THE COLLECTOR OF KISTNA),RESPONDENT.*

Right of suit—Acquisition of Inam land by Government for Municipal purposes—Madras District Municipalities Act (IV of 1884), sec 279, effect of—Sale by Municipality—Imposition by Government of ground-rent on occupier—Ground-rent, liability to pay—G O 210 of 20th February 1889, effect of—Exemption from ground rent to be express.

Even an inam land which is subject only to a quit-rent becomes when acquired by Government under the Land Acquisition Act, ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier whether deriving his title directly from the Government or from a Municipality which after such acquisition by the Government becomes owner under section 279 of the Madras District Municipalities Act (IV of 1884) by payment of the amount settled as compensation Acquisition is only by the Government and not by the Municipality, hence the previous Inamdar's right to exemption from assessment does not rest in the Municipality. A transferee from the Municipality of such land cannot therefore claim as against the Government exemption from assessment A person who claims exemption from the payment of such assessment as the Government may fix must show some grant exempting him from the payment of the ordinary assessment. No exemption can be claimed without a grant or exemption in express words

Effect of G O. No 210, dated 20th February 1889, permitting Municipal Councils to transfer lands vested in them by sale, mortgage or otherwise, was not to exempt the transferees from ordinary assessment that might be imposed but was only to remove all objection to the transfer on the ground that the transferor is a Municipal Council

SECOND APPEAL against the decree of A. C. DUTT, the Acting District Judge of Kistna at Masulipatam, in Appeal Suit No. 157 of 1908 presented against the decree of P. ADINARAYANIAH, the District Munsif of Bezwada, in Original Suit No. 324 of 1906.

The facts of this case are set out in the judgment.

T. Prakasam and *V. Ramadoss* for the appellant.

The Government Pleader for the respondent.

* Second Appeal No. 221 of 1910.

KARUTHAPPA ROWTHAN v. BAVA MOIDEEN SAHIB.

SUNDARA AYYAR AND PHILLIPS, JJ.

other words we may say that not only does the document say that the amount which the executant agreed to pay on demand was Rs. 600, but that Exhibit A was a promissory-note for it. It appears to us to be impossible to hold that such an instrument can be read otherwise than as a promissory-note. It is no doubt true that the question whether an instrument is a promissory-note or not should be judged by the words used, and that the instrument must contain in words an unconditional undertaking to pay a sum of money, and it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money. Judging this instrument by this test, we have no hesitation in saying that the executant unconditionally promised by it to pay the amount of Rs. 600 to the appellant's transferor.

Several cases have been cited by the learned Advocate-General, viz. *Tirupathi Goundan* v. *Rama Reddi*(1), *Govind* v. *Balwantrao*(2), *Horne* v. *Redfearn*(3) and *White* v. *North*(4), in support of his argument. But in all these cases there was no language of promise to pay a sum of money. There was an acknowledgment of receipt of money or of indebtedness and an admission that the executant was accountable to the other party. In one case the document said "accountable for the amount with interest." In another case it said "accountable for the money so many months afterwards." The important distinction between them and the present case is that there was no promise in terms to pay. On the other hand in another case cited by the learned Advocate-General, *Morris* v. *Lee*(5), the executant promised to be accountable and the instrument was held to be a promissory-note. Here not only has the executant promised to pay but he has said that the instrument is his promissory-note for the amount due. We dismiss the Second Appeal with costs.

(1) (1898) I.L.R., 21 Mad., 49.
(2) (1898) I.L.R., 22 Bom., 056.
(3) (1838) 4 Bing. (N. C.), 433.
(4) (1849) 3 Exch Reports, 689.
(5) 92 E.R., 409.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

C. HANUMANLU PANTULU (PLAINTIFF), APPELLANT,

1911. October 11 and 12.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) (REPRESENTED BY THE COLLECTOR OF KISTNA), RESPONDENT.*

Right of suit—Acquisition of Inam land by Government for Municipal purposes—Madras District Municipalities Act (IV of 1884), sec. 279, effect of—Sale by Municipality—Imposition by Government of ground-rent on occupier—Ground-rent, liability to pay—G.O. 210 of 20th February 1889, effect of—Exemption from ground rent to be express.

Even an inam land which is subject only to a quit-rent becomes when acquired by Government under the Land Acquisition Act, ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier whether deriving his title directly from the Government or from a Municipality which after such acquisition by the Government becomes owner under section 279 of the Madras District Municipalities Act (IV of 1884) by payment of the amount settled as compensation. Acquisition is only by the Government and not by the Municipality, hence the previous Inamdar's right to exemption from assessment does not rest in the Municipality. A transferee from the Municipality of such land cannot therefore claim as against the Government exemption from assessment. A person who claims exemption from the payment of such assessment as the Government may fix must show some grant exempting him from the payment of the ordinary assessment. No exemption can be claimed without a grant or exemption in express words.

Effect of G.O. No. 210, dated 20th February 1889, permitting Municipal Councils to transfer lands vested in them by sale, mortgage or otherwise, was not to exempt the transferees from ordinary assessment that might be imposed but was only to remove all objection to the transfer on the ground that the transferor is a Municipal Council.

SECOND APPEAL against the decree of A. C. DUTT, the Acting District Judge of Kistna at Masulipatam, in Appeal Suit No. 157 of 1908 presented against the decree of P. ADINARAYANIAH, the District Munsif of Bezwada, in Original Suit No. 324 of 1906.

The facts of this case are set out in the judgment.

T. Prakasam and *V. Ramadoss* for the appellant.

The Government Pleader for the respondent.

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* Second Appeal No. 221 of 1910.

HANUMANLU v. SECRETARY OF STATE.

SUNDARA AYYAR AND PHILLIPS, JJ.

JUDGMENT.—The plaintiff's suit is for a declaration that the Government is not entitled to levy ground-rent for certain land in his occupation and for the recovery of the amount collected from him by the Government as ground-rent.

The District Judge has decided, and, in our opinion, quite rightly, that the plaintiff has not made out any cause of action. Two points are argued in Second Appeal. The first is that the Municipality acquired by the Land Acquisition proceedings the inam right which belonged to the original owners of the land and that by successive sales the plaintiff now owns that right. The Government, it is contended, is entitled only to quit-rent as from the inamdar and not ground-rent. Assuming that a Civil Court could go into this question, there is really no basis for the contention. The land was acquired by the Government for the requirements of the Bezwada Municipality under the Land Acquisition Act. It is quite clear that when the land was acquired, the title to it vested in Government. See section 16 of the Act. Section 279 of Madras Act IV of 1884 does not help the plaintiff at all. It provides that on payment by the Municipality of the amount of compensation awarded for the land, the land shall vest in the Municipality. It is quite clear from that section itself that it is the Government that is to acquire the land. The effect of the section is merely to declare that the title which vests in the Government by the acquisition passes to the Municipality when the Municipality pays the amount settled as compensation. The title of the Municipality, therefore, was derived from Government. When the land became vested in Government it became ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier. If the plaintiff claims to hold the land free from the payment of such assessment as the Government may fix he must show some grant exempting him from the payment of the ordinary assessment. The appellant's counsel argues that it must be taken that there was such a grant in this case, because, when G.O. No. 210, dated the 20th February 1889, was issued permitting Municipal Councils to transfer lands vested in them by sale, mortgage or otherwise, no condition was inserted that the assignee would be liable to pay such assessment or ground-rent as might be fixed by the Revenue authorities and that this condition was inserted only in an order passed in the year 1900.

The argument is that, under the previous order of 1889, every transferee from the Municipality would acquire an absolute right to the property transferred free from the payment of any assessment, in other words, that order granted an exemption from payment of land revenue to all persons who might purchase lands from the Municipality. This is a contention which it is impossible to uphold. There are no words of exemption from liability to assessment in the Government order of 1889. No exemption can be claimed without a grant or exemption in express words. The construction to be placed on the order of 1889 would be that the transferees would obtain a title to the land under their transfers although the transferer might be a Municipal Council, *i.e.*, to remove all objection to the transfer on the ground that the transferer is a Municipal Council. There is no reason for differing from the conclusion of the Lower Appellate Court. We dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

1911
October 20.

V VYDINADIER (DEFENDANT IN ALL), APPELLANT IN ALL,

v.

G KRISHNASWAMI IYER (PLAINTIFF), RESPONDENT IN SECOND APPEAL No. 286 OF 1910

VAITHINATHIER (PLAINTIFF), RESPONDENT IN SECOND APPEAL No. 287 OF 1910.

VENKATARAMAIYAR (PLAINTIFF), RESPONDENT IN SECOND APPEAL No 288 OF 1910.*

Malicious prosecution—What has to be proved—Onus on plaintiff—What amounts to malice—Recklessness in what, amounts to malice.

In a suit for damages for malicious prosecution it is not on the defendant to show that there was reasonable and probable cause but on the plaintiff to prove its absence. All that the defendant has to be satisfied about is that there is reasonable and probable cause for the charge, i e, reasonable grounds for believing that the plaintiff is guilty of the offence and not reasonable grounds for coming

* Second Appeals Nos. 286, 287 and 288 of 1910.

HANUMANLU v. SECRETARY OF STATE.

SUNDARA AYYAR AND PHILLIPS, JJ.

JUDGMENT.—The plaintiff's suit is for a declaration that the Government is not entitled to levy ground-rent for certain land in his occupation and for the recovery of the amount collected from him by the Government as ground-rent.

The District Judge has decided, and, in our opinion, quite rightly, that the plaintiff has not made out any cause of action. Two points are argued in Second Appeal. The first is that the Municipality acquired by the Land Acquisition proceedings the inam right which belonged to the original owners of the land and that by successive sales the plaintiff now owns that right. The Government, it is contended, is entitled only to quit-rent as from the inamdar and not ground-rent. Assuming that a Civil Court could go into this question, there is really no basis for the contention. The land was acquired by the Government for the requirements of the Bezwada Municipality under the Land Acquisition Act. It is quite clear that when the land was acquired, the title to it vested in Government. See section 16 of the Act. Section 279 of Madras Act IV of 1884 does not help the plaintiff at all. It provides that on payment by the Municipality of the amount of compensation awarded for the land, the land shall vest in the Municipality. It is quite clear from that section itself that it is the Government that is to acquire the land. The effect of the section is merely to declare that the title which vests in the Government by the acquisition passes to the Municipality when the Municipality pays the amount settled as compensation. The title of the Municipality, therefore, was derived from Government. When the land became vested in Government it became ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier. If the plaintiff claims to hold the land free from the payment of such assessment as the Government may fix he must show some grant exempting him from the payment of the ordinary assessment. The appellant's counsel argues that it must be taken that there was such a grant in this case, because, when G.O. No. 210, dated the 20th February 1889, was issued permitting Municipal Councils to transfer lands vested in them by sale, mortgage or otherwise, no condition was inserted that the assignee would be liable to pay such assessment or ground-rent as might be fixed by the Revenue authorities and that this condition was inserted only in an order passed in the year 1900.

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APPELLATE CIVIL.

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ACHUTHA MENON v. SANKARA NAIR. —— BENSON AND SUNDARA AYYAR, JJ.

In some cases land is mortgaged on this tenure, the *kanam* mortgagee paying the surplus rent produce to the landlord, after deducting the interest of the money he has advanced. The tenant has, in North Malabar, only a life-interest in the property, which at his death reverts to the landlord. In the South, the land is enjoyed by the tenant and his descendants, until there is a failure of heirs, when it reverts to the proprietor. Except where the land is granted for special services, an annual rent is payable under this tenure. The tenant's right is confined to that of cultivation, but it is permanent, and he cannot be ousted for arrears of rent, which must be recovered by action, unless there be a specific clause in the deed declaring the lease cancelled, if the rent be allowed to fall into arrears." —Moore's "Malabar Law and Custom," page 308.

It will be observed that a *Karamkari* holder in North Malabar has no heritable right at all, and with respect to South Malabar the right of reversion in the landlord *primâ facie* supports the appellant's contention that the tenure is inalienable. Moreover the tenant's right is stated to be "confined to that of cultivation" though it is permanent. The word "*Karamkari*" or "*Karaimakari*" itself means only permanent right of cultivation. The language of the instrument shows that the cultivator has no right of alienation. We must therefore hold that the alienation put an end to the right created by Exhibit VII. The plaintiff is therefore entitled to a decree for possession. Payment of rent by the fourth defendant to the fifth defendant is not valid as against the plaintiff. He is therefore entitled to a decree for rent also. The decree of the Lower Appellate Court is reversed and that of the District Munsif restored with costs payable by the fourth defendant both here and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Spencer.

C. ANANT HRAZU GARU AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

1911. October 5 and 27. November 7.

v.

C. NARAYANARAZU GARU AND TWO OTHERS (DEFENDANTS NOS 1, 4 AND 5), RESPONDENTS.*

Limitation Act (XV of 1877), art. 120—Attachment of wrong man's property—No suit filed—Subsequent sale of property under attachment—Fresh cause of action from date of sale—Article 120, applicable—Absence of suit questioning attachment, no bar to subsequent suit on sale

Though attachment of a person's land as if it belonged to another, gives the owner a cause of action, on which he could have brought a suit, but did not, yet the sale of the same at a later date is a fresh and greater invasion of his right and gives him a fresh cause of action on which he could sue within six years from the date of sale under article 120 of the Limitation Act. Though he might have sued after the attachment, he was not bound to sue.

The sale though held in pursuance of the attachment was not a necessary consequence of it

Robert Skinner v. *Shanker Lal* [(1909) I L.R., 31 All., 10 (*note*)], followed.

Per curiam—The attachment gives the judgment-creditor certain rights in execution, but the title to the property continues in the owner, notwithstanding the attachment and it so continues even if the owner's objection to the attachment be disallowed.

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A father alienated his sons' lands, which they got from their mother, as if it was his family property and the alienees the second and third defendants got a decree against the father and in execution of that decree attached the properties on 21st November 1898. A claim petition was put in by the sons (plaintiffs) on 1st December 1900, which was dismissed without investigation as too late. Though there was a second attachment on 7th August 1905, the first attachment of 1898 was not discharged

* Second Appeal No. 755 of 1910.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Spencer.

1911.
October
5 and 27
November

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Spencer.

1, Oct. 5 and November

C. ANANTHRAZU GARU AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

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ASSISTANT SESSIONS JUDGE, NORTH ARCOT v. RAMAMMAL.

SUNDARA AYYAR AND SPENCER, JJ.

by the High Court or the Court of Session (as the case may be). The expression "the Court of Session" here can only mean the Court of Session having jurisdiction to try the case under section 177, Criminal Procedure Code. Section 63 of Act X of 1872 provided that " Magistrates shall ordinarily commit to the Court of Session for the sessions division in which the districts to which they are appointed is situated." But the present Criminal Procedure Code contains no similar provision. The Bombay High Court in *Queen Empress* v. *Thaku*(1) held that the commitment should be to the Court empowered to try the case under section 177, Criminal Procedure Code. The learned Judges in that case having to deal with a commitment made to a Court not having such jurisdiction did not quash the commitment but directed the transfer of the case to the Court having jurisdiction. But the Privy Council has pointed in *Ledgard* v. *Bull*(2) that a transfer from a Court having no jurisdiction would not render the proceedings legal. The Allahabad High Court in *Queen Empress* v. *Ram Dei*(3) followed a similar course, but *Ledgard* v. *Bull*(2) was apparently not brought to its notice. We do not therefore think that we would be justified in upholding the commitment and directing the transfer of the case to the Sessions Court of Salem. We must hold that the commitment is illegal and set aside the order of the Sub-Magistrate of Tiruppattur. As we are informed that an appeal against the judgment of the District Munsif's Court of Tiruppattur in Original Suit No. 1062 of 1909 is still pending we do not consider it necessary to pass any further order in the case at present.

(1) (1883) I L R, 8 Bom, 312. (2) (1887) I.L R, 9 All, 191 (P C).
(3) (1896) I.L R, 18 All., 350.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

1911.
December 5.

Re MUTHIAH CHETTY—(PRISONER) APPELLANT.*

Indian Penal Code (Act XLV of 1860), sec. 471—"Using", definition of.

The mere production of a document in obedience to the summons of a Court cannot amount to "using" it within the meaning of section 471, Indian Penal Code.

Assistant Sessions Judge, North Arcot v. *Ramammal* [(1913) I.L.R., 36 Mad. 387], followed.

Where a document having been produced upon an order of the Court the witness gives false evidence regarding it, such giving of false evidence cannot by itself be considered a fraudulent user of the document within the meaning of section 471, Indian Penal Code. A mere statement that a document is genuine does not amount to using it as genuine.

APPEAL against the conviction and sentence of D. G. WALLER, the Sessions Judge of the Madura Division, in Sessions case No. 39 of the Calendar for 1911.

The facts of this case are sufficiently set out in the judgment.

R. Sadagopachariar, V. Venkatachariar, V. K. Venkatarama Ayyar, C. Narasimhachariar and *C. V. Ananthakrishna Ayyar* for the appellant.

The Public Prosecutor *contra*.

SUNDARA AYYAR AND SPENCER, JJ.

JUDGMENT.—In this case the accused has been convicted under section 471 of the Indian Penal Code of fraudulently or dishonestly using as genuine a document which he knew or had reason to believe to be a forged document.

The facts are that the accused was summoned to produce the document in question (Exhibit J) in Original Suit No. 39 of 1910 on the file of the Subordinate Judge's Court of Madura (West). He was not a party to that suit. In answer to the Court's summons he produced the document. He was afterwards examined as a witness in that case and he gave the deposition marked as Exhibit K. He then stated on oath that the prosecution first witness in that case gave the document to him. The learned Sessions Judge has found that the document was not genuine and that the prosecution first witness did not give it to

Re MUTHIAH CHETTY. — SUNDARA AYYAR AND SPENCER, JJ.

the accused. We decide the case on the assumption that these findings are correct. So far as the production of the document was concerned the accused was bound to obey the summons of the Court Section 162 of the Indian Evidence Act lays down that every witness summoned to produce a document shall do so, and section 175 of the Indian Penal Code makes the non-production an offence punishable under that section. We adhere to the opinion we expressed in *Assistant Sessions Judge, North Arcot* v. *Ramammal*(1) that the production by a party of a document which he is bound by law to produce cannot by itself constitute a user of that document by him. He cannot be put to the risk of having to consider whether a document answering the description contained in the summons is in fact genuine and whether there is any reason to believe it to be not genuine. The mere production of a document in answer to a command of Court can in no case be regarded as fraudulent in law. The learned Public Prosecutor argues that the accused did more than produce the document in this case because he swore when he was examined as a witness, that the document was handed to him by the prosecution first witness, and he urges that, assuming as we are prepared to do for the purpose of deciding this question of law that the accused had the dishonest intention when he gave his evidence of inducing the Court to give judgment in favour of the plaintiff in that suit, his giving evidence would make the act a dishonest user of the document by him. We must put entirely out of account the fact that he produced the document, as that act was perfectly innocent. All that is then left is that he gave false evidence with the fraudulent intention of causing loss to one of the parties in the suit. We are clearly of opinion that the giving of false testimony by itself with a fraudulent intention cannot amount to a fraudulent user of a document with reference to which that evidence is given. Otherwise every attesting witness who gives evidence with a similar dishonest intention might also be held guilty of dishonestly using the document. It is not contended that there is any evidence in this case of user beyond the fact that he gave evidence. There is no evidence of any previous conspiracy in pursuance of which he gave the evidence. We must therefore hold that the accused did not commit an offence

(1) (1913) I.L.R., 36 Mad., 387.

RE MUTHIAH CHETTY.

SUNDARA AYYAR AND SPENCER, JJ.

under section 471 of the Indian Penal Code. If the evidence he gave was false he would of course be guilty of perjury. But he is not charged with that offence in this case.

In *Asimuddi Sheikh* v. *King-Emperor*(1), RAMPINI and GUPTA, JJ. held that a party who had produced a document before a munsif for obtaining compulsory registration of it could not be held guilty of an offence under section 471 of the Indian Penal Code by merely declaring it to be genuine before a Deputy Magistrate to whom the document was sent over by the Munsif for an inquiry being held as to whether he was guilty of forging the document. The statement before the Deputy Magistrate was not made by the accused on oath and he could not therefore be convicted of perjury. It was sought to be argued that he was guilty of using the document as genuine by declaring it to be true. The learned Judges say "He may have used the document before the Munsif when he brought a suit to enforce registration, but he is not charged in this case with using the document before the Munsif. . . He is charged with using it before the Deputy Magistrate . . . . , and we do not think he can be said to have committed any offence on the 21st January 1902, punishable under section 471, Indian Penal Code." There is of course a difference between that case and this in that the statement made by the accused as a witness in this case was made on oath while in the Calcutta case the statement was made by him before the Deputy Magistrate as an accused person and not on oath. But that does not affect the general proposition that a mere statement that a document is genuine does not amount to using it as genuine. We therefore set aside the conviction of the accused. We do not consider it necessary to pass any further order having regard to the state of the evidence on record. The bail bonds executed by the accused will be discharged.

(1) (1907) 11 C.W.N., 838.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Spencer.

SRI RAJAH BAMMADEVARA VENKATA NARASIMHA NAIDU BAHADUR, ZAMINDAR GARU (CLAIMANT), APPELLANT IN BOTH THE APPEALS, 1911, September, 6 and 7.

v.

A. SUBBARAYUDU AND SEVEN OTHERS (RESPONDENTS), RESPONDENTS IN APPEAL NO 38 OF 1909,

AND

M NARASIMHAM AND THIRTY ONE OTHERS (RESPONDENTS), RESPONDENTS IN APPEAL NO 39 OF 1909 *

Land Acquisition Act (I of 1894)—Apportionment of compensation between zamindar and occupancy ryot, principles of—Value of trees on land acquired, to be given to whom.

In making an apportionment of compensation for land, awarded under the Land Acquisition Act, between a zamindar and his occupancy tenant, several factors are to be taken into consideration for determining their respective rights in the land, such as, expenses of cultivation, the fact that the cultivator has a home and a sphere for labour for himself and his family and the nature of the tenure.

The principle of *Appasami Mudali v. Rangappa Nattan* [(1882) I L R, 4 Mad, 367], applied.

This decision which apportioned, on the facts of that case, three-fifths to the zamindar and two-fifths to the ryots was not intended to lay down a general rule applicable to all cases

On the facts of this case their Lordships affirmed the decision of the Lower Court which apportioned the compensation given for land in the ratio of three-fifths to the ryots and two-fifths to the zamindar.

Shama Prosunno Bose Mozumdar v. Brakeda Sundari Dasi [(1901), I L R, 28 Calc., 146], *Dinendra Narain Ray v Titturam Mukerjee* [(1903) I L R., 30 Calc., 801], *Bhupati Roy v Secretary of State* [(1907) 5 C.L J., 662] and *Satis Chunder Chattopadhya v. Rai Jatindra Nath Chowdhury* [(1908) 7 C.L J., 284], distinguished.

Raja Bommadevara Venkatanarasimha Nayudu Bahadur v. Lakshmanna, Appeal No. 119 of 1893 and *Rajah Ramachandra Appa Rao Bahadur v. Sriramulu*, Appeal No 118 of 1898 referred to.

On a consideration of the whole evidence in the case, their Lordships affirmed the decision of the Lower Court which gave to the ryots the whole value of the trees (trees) that stood upon the land which was compulsorily acquired.

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* Appeals Nos. 38 and 39 of 1909.

SRI RAJAH BAMMADEVARA VENKATA NARASIMHA NAIDU BAHADUR v. SUBBARAYUDU.

Narayana Ayyangar v. *Orr* [(1903) I.L.R., 26 Mad., 252] and *Bidda Golleppa* v. *The Maharaja of Vizianagram* [(1907) I.L.R., 30 Mad., 155], distinguished.

Per Curiam—Proceedings under Part III of the Act are not by way of appeal and what is contemplated is a new enquiry by the District Judge.

APPEALS against the awards of P. KERSHASP, the Acting District Judge of Kistna, dated the 24th July 1908, in Original Petition No. 123 of 1908 and Compensation Case No. 1 of 1908; and Original Petition No. 124 of 1908 and Compensation Case No. 2 of 1908.

The facts of this case are fully set out in the judgment of the Honourable the Chief Justice.

P. Nagabhushanam for the appellant in both cases.

T. Prakasam for respondents Nos 4, 17 to 19 and 29 to 31.

The Government Pleader for the thirty-second respondent.

WHITE, C.J.

THE CHIEF JUSTICE.—These are two appeals from awards made by the Acting District Judge of Kistna in proceedings under the Land Acquisition Act. They are both appeals by the zamindar. The awards give the ryots the whole value of the trees that stood upon the land which was compulsorily acquired, and apportion the total compensation awarded in respect of the land compulsorily acquired in the ratio of three-fifths to the ryots and two-fifths to the zamindar.

I will deal first with that part of Appeal No. 33, which has reference to the value of the trees. With regard to this the District Judge says, "I uphold the Collector's award." Then he points out that the dispute centres round the value of trees and he says that 'the zamindar has no evidence to adduce in this case.' That is practically the whole of his award with reference to this question as to whether the whole value of the trees should go to the zamindar as the zamindar claimed or the whole value should go to the ryots as the ryots claimed. Now the award which the District Judge says he upholds so far as we can follow the course of the proceedings and it has been by no means easy to do so—seems to be the revised award which is printed on page 9 of the pleadings paper in Appeal No. 33. It is not clear under what provision of law the Deputy Collector was called upon by the District Judge to make a revised award after the reference to the Judge under section 30 had been made. However a revised award was made. Mr. Prakasam has contended that in as much as no evidence has been adduced before the

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District Court by the party on whose behalf the order of reference was made the District Court had no alternative but to decline to interfere with the award made by the Deputy Collector. No doubt proceedings under Part III of the Act are not by way of appeal and what is contemplated is a new inquiry by the District Judge But I am not prepared to go so far as to say that because a party on whose behalf the order of reference is made adduces no evidence before the Court, he is precluded from asking the Court for a modification of the award as made by the Collector, although of course the fact that he is not in a position to adduce evidence before the Judge is a matter to be taken into consideration in determining whether the award of the Collector should be disturbed.

In the award of the Collector with reference to the question of trees the Collector refers to a provision in the muchilika that as the cist on palmyras and other trees is not included in this cist I (meaning the ryot) shall not object to any arrangement you (meaning the zamindar) may make regarding them The Deputy Collector points out that this is capable of being interpreted to mean either that the ryot could take the trees paying a separate cist therefor or that the zamindar is the sole master. Apparently it means that if the zamindar insists upon a separate cist for the trees the ryot will not object to paying it. There is no evidence that the zamindar ever did insist upon cist for the trees and the evidence called on behalf of the ryots shows that they had the use and enjoyment of the trees I do not think it necessary for us to consider the questions of law raised in the cases: *Narayana Ayyangar* v. *Orr*(1), and *Bodda Goddeppa* v. *The Maharaja of Vizianagram*(2). No doubt there are cases in which damages have been awarded to zamindars in respect of trees cut by the ryots, specially, and it may be, in the case of fruit trees, and the trees in question in this case are fruit trees. Cases which turn on special agreements as between the zamindar and the ryot do not afford us very much assistance in this case. We have to deal with it with reference to the special condition to which I have referred and in the light of the evidence with regard to user and in view of the fact that the zamindar did not think it necessary or was not able to adduce any evidence before

(1) (1903) I.L.R., 26 Mad., 252. (2) (1907) I.L.R., 30 Mad., 155.

SRI RAJAH BAMMADEVARA VENKATA NARASIMHA NAIDU BAHADUR v. SUBBARAYUDU.

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the District Court. I am not prepared to say that the learned Judge was wrong in upholding the Collector's award with regard to the question of trees.

I now turn to the other question and that is—was the learned Judge right in upholding the award of the Deputy Collector with reference to the question of apportionment. The learned Judge says—"I uphold the Collector's award." The Collector's award is to be found on page 3 of the papers in Appeal No. 38. In that award with reference to this question the Deputy Collector states the contentions on both sides. He states that the contention of the zamindar was that the compensation should be divided between the zamindar and the ryots in the proportion of three-fifths to two-fifths and that the contention of the ryots was that they were entitled to the whole of the compensation with the exception of one ryot who is content with three-fourths to the zamindar and one-fourth to himself. His finding is in paragraph 5—"The rates of apportionment between tenants and the zamindar will be three-fifths and two-fifths." I think I am right in saying that in his award he gives no reasons for apportioning compensation in these ratios. But in the reference to the District Court which is to be found printed on page 9 of the pleadings papers in Appeal No. 39 of 1909, which is stated to be under section 18 of the Act though really it is under sections 18 and 30, he does give reasons why the award is apportioned in these ratios. They are to be found in paragraph 8. He cites the principle laid down in certain Calcutta cases and with reference to that he says—"If the principle contained in the above rulings were adopted the zamindar would get much less than what has been awarded," that is much less than two-fifths out of five-fifths. Now in the award by the District Judge with reference to this part of the case, all that the Judge says is—the claimant is not ready with his evidence. With regard to that the same observations that I have made with reference to the other appeal seem to me to be applicable. Then he says—"Two judgments the zamindar relies on, but neither of these relate to the village in which the lands in controversy were acquired. I uphold the Collector's award." That really is the whole of the District Judge's award with reference to this question of apportionment. On behalf of the zamindar Mr. Nagabhushanam has contended that on the strength of the

judgments to which the District Judge refers the award ought to be varied by giving the zamindar three-fifths out of the total amount leaving two-fifths to the ryots.

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Before I refer to the two judgments upon which Mr. Nagabhushanam relies I would like to refer to a decision which is cited in one of the judgments, viz., *Appásámi Mudali* v. *Rangappa Nattan*(1). That was a case in which the question arose as to the apportionment of compensation as between the mirasidar and a party holding under an *Ulkudi* tenure. The Court found that as between the mirasidar and the party holding under *Ulkudi* tenure in the division of the produce 5 kalams and 2 marakals went to the zamindar, 8 marakals to the mirasidar and 4 kalams and 2 marakals to the *Ulkudi*. We are told that 12 marakals make one kalam. My learned brother has referred to the definition of marakal in Wilson's Glossary and it appears there that it is one-twelfth of a kalam and this appears to be correct So the ratio will be 62 marakals to the zamindar, 8 marakals to the mirasidar and 50 marakals to the *Uikudi* out of 120 marakals. That seems to be the first factor considered by the Court in apportioning the compensation. Then the Court refers to another matter which should be taken into consideration, viz., the expenses of cultivation and the fact that the cultivator has a home and a sphere for labour for himself and his family. Taking all the factors into consideration, the Court comes to the conclusion that the interests should be apprised by awarding three-fifths to the mirasidar and two-fifths to the cultivator. The exact nature of the tenure of the cultivator in this case is not clear (see pages 3 to 97 of the judgment). It would seem however that he had not the same unqualified right of permanent occupancy such as is admitted to be the right of the ryots in the case now before us.

Now one of the judgments on which Mr. Nagabhushanam relies is an unreported decision of this Court, *Raja Bommadevara Venkatanarasimha Nayudu Bahadur* v. *Lakshmanna* (2). The question arises with reference to the same zamindari as that in which the land in the present case is situate. That is a decision by SHEPPARD, J., and BODDAM, J., on appeal from the District Judge who gave an award under the Act. The District

(1) (1882) I.L.R., 4 Mad., 367. (2) Appeal No. 119 of 18[illegible].

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judgments to which the District Judge refers the award ought to be varied by giving the zamindar three-fifths out of the total amount leaving two-fifths to the ryots.

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(1) (1882) I.L.R., 4 Mad., 367. (2) Appeal No. 119 of 1893.

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Judge purported to apply the principle of the decision in *Appásámi Mudali v. Rangappa Nattan*(1) and applying that principle he worked out the ratios as one-fifth to the zamindar and four-fifths to the ryot. This Court in dealing with his judgment observes: "The District Judge appears to have been guided by figures as to which there is no evidence whatever. No evidence having been adduced, we think he ought to have followed the rule laid down in *Appásámi Mudali v. Rangappa Nattan*(1) and apportioned three-fifths to the zamindar and two-fifths to the ryots." I do not think the Judges intended in *Appásámi Mudali v. Rangappa Nattan*(1) to lay down a general rule. I do not think they intended to lay down that in all cases where compensation has to be apportioned between a zamindar and ryots with a permanent right of occupancy and there is no evidence before the District Judge, the compensation should be apportioned in the ratio of three-fifths to two-fifths. If they did so intend with all respect, I must say that I am not prepared to follow them.

The other case which was cited before the District Judge and on which Mr Nagabhushanam relies is *Rajah Ramachandra Appa Rao Bahadur v. Sriramulu*(2). There the zamindari is not the same but the land was situated in the same district as the zamindari with which we are now concerned is situated. That is a judgment of SUBRAMANIA AYYAR, J. and MOORE, J. and this question of the ratios was only raised in the memorandum of objections which was put in by the ryots on the appeal by the zamindar with reference to the award of the District Court as regards the question of occupancy right. It would appear that the memorandum of objections put in by the ryots was that the apportionment of three-fifths to the zamindar and two-fifths to the ryots was wrong. That memorandum of objections was dismissed. But there is nothing to show that this question was argued or even stated to the Court. There is nothing to suggest that the learned Judges had before them the decision in *Raja Bommadevara Venkatanarasimha Nayudu Bahadur v. Lakshmanna*(3) or that this question was in any way considered. I do not think we ought to regard the decision in *Rajah Ramachandra Appa Rao Bahadur v. Sriramulu*(2) as accepting or

(1) (1882) I L R, 4 Mad, 367. (2) Appeal No. 118 of 1898.
(3) Appeal No. 110 of 1893.

affirming the decision of SHEPPARD, J., and BODDAM, J., to which I have referred. It seems to me the real principle is that laid down in *Appásámi Mudali* v. *Rangappa Nattan*(1). That is certain factors should be taken into consideration and apportionment made after a consideration of the various factors. If there is no evidence before the District Judge, he is of course entitled to take this fact into consideration in determining whether he should disturb the award of the Collector.

Mr. Prakasam has called our attention to several Calcutta cases, viz., *Shama Prosunno Bose Mozumdar* v. *Brakoda Sundari Dasi*(2), *Dinendra Narain Ray* v. *Titu ram Mukerjee*(3), *Bhupati Roy* v. *Secretary of State*(4) and *Satis Chunder Chattopadhya* v. *Rai Jatindra Nath Choudhury*(5). The principle of apportionment there is not altogether the same as the principle laid down in *Appásámi Mudali* v *Rangappa Nattan*(1). I do not know whether we need compare these two principles, because so far as the Calcutta cases are concerned the tenure owned by the cultivator is not the same as the tenure by right of permanent occupancy which is enjoyed by the ryots in this case, and it is not quite clear what was the precise nature of the tenure in some at any rate of the Calcutta cases. So I do not propose to discuss it. All I propose to say with reference to the award in this appeal is that applying what seems to me to be the principle we ought to apply, namely that laid down in *Appásámi Mudali* v. *Rangappa Nattan*(1) so far as we can apply it in the absence of evidence before the District Judge it cannot be said that an apportionment of three-fifths to the ryots is excessive. It seems to me that the appellant in this case has failed to show that the District Judge was wrong in upholding the two awards made by the Deputy Collector. Appeal No. 38 will be dismissed with costs.

As regards Appeal No. 39 the Collector was made a party to the appeal and so far as the Collector has any interest in the appeal the award of the District Judge states that the zamindar's vakil gave up his contention as regards the amount of compensation payable. That was the only question which arose in

(1) (1882) I.L.R., 4 Mad., 367. (2) (1901) I.L.R., 28 Calc., 1[illegible].
(3) (1903) I.L.R., 30 Calc., 801. (4) (1907) 5 C.L.J., 602.
(5) (1908) 7 C.L.J., 281.

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between the zamindar and the Collector. In these circumstances I think Appeal No. 39 must be dismissed with costs of the ryots and also with costs of the Collector.

SPENCER, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. September 6 and 7.

BAVA JEER CHETTI (THIRD RESPONDENT—CREDITOR No. 3), APPELLANT,

v.

BAVA RENGASAMI CHETTI (PETITIONER—DEBTOR), RESPONDENT.*

Provincial Insolvency Act (III of 1907), ss. 4, 5, 6, 11, 12, 14, 15, 16, 26, 43, 44 and 47—What matters are necessary to be enquired into before adjudication—What are proper subjects of enquiry before deciding on final discharge.

Before passing an order of adjudication under the Provincial Insolvency Act, it is not for a Court to decide whether the debts stated in the petition for insolvency are real, whether the petitioner has not concealed any property of his from his list of assets or whether he is unable to pay his debts and similar questions. All these are properly subjects that ought to be enquired into before giving a discharge. The only things that are necessary to be decided before adjudication are whether the creditor or debtor is entitled to present the petition, whether the required notices have been served and whether the debtor has committed the alleged act of insolvency.

Per Curiam—Section 14 (2) provides that "the Court shall also examine the debtor if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing and the creditors have the right to question the debtor thereon." There is no doubt that both these clauses require that the acts referred to therein should be done. But it does not follow that every matter which forms the subject of the examination of the debtor should be decided before an order of adjudication is made. The scheme of Act III of 1907 is to make an order of adjudication at first and then to make a full enquiry into all matters connected with the insolvency before the final discharge is decided. The Court has power to refuse to make an order not only on non-compliance of matters stated in section 14 (1) but also on other grounds (e.g.) prevention of abuse of process of the Court, unnecessary harassing of a debtor by the creditor.

Per SUNDARA AYYAR, J.—The object of the provision for examination in section 14 (2) is as in England to obtain information at as early a stage as possible of

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* Civil Miscellaneous Appeal No. 268 of 1909.

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the property and the whole conduct of the debtor in relation to the insolvency proceedings

Udai Chand Mait v. *Ram Kumar Khara* (1910) 15 C.W.N., 213, *Girwardhari* v. *Jai Narain* (1910), I.L.R., 32 All., 645 and *Nathu* v. *The District Judge of Benares* (1910), I.L.R., 32 All., 547, disapproved.

Various sections of the Act and of the English Bankruptcy Act, considered.

APPEAL against the order of E. L. THORNTON, the District Judge of Trichinopoly, dated the 26th October 1909, in Insolvent Petition No 3 of 1908.

The facts of this case are fully set out in the judgment of SUNDARA AYYAR, J.

T. R. Venkatarama Sastri for the appellant.

V. C. Seshachariar for the respondent.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—This is an appeal by a creditor against an order of the District Court of Trichinopoly adjudicating the debtor an insolvent on his own application. The appellant in his statement in the lower court stated that all the debts stated in the debtor's petition except his own were non-existing debts at the date of the petition having been previously discharged, and that the petitioner did not include in his schedule a house worth Rs. 1,000 which belonged to him. The learned District Judge in his order states that it was admitted before him that the debts due by the applicant exceeded Rs. 500. He disallowed the contention of the appellant that the Court was bound to decide whether the debts which were questioned by him were real or fictitious debts and also whether the petitioner was really unable to pay his debts as stated by him in his petition. The argument appears to have been based in the lower court on the provisions of section 15, sub-section (1) of the Provincial Insolvency Act, III of 1907. The District Judge was of opinion that it was only in an application by a creditor that the Court under section 15 (1) has to be satisfied whether the debtor was able to pay his debts and whether for any other sufficient cause no order of adjudication should be made.

It is contended in appeal before us that the District Judge was bound to consider before passing the order of adjudication whether it had been satisfactorily proved that the debts were real and that the petitioner was unable to pay his debts. The argument is not rested before us on section 15 (1). I agree with the District Judge in his construction of that section that whether the petition is by the

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debtor or by a creditor, the Court has under section 15 to be satisfied of the petitioner's right to present the petition. When the petition is by a creditor, it has to be further satisfied of the service of notice on the debtor and of the alleged act of insolvency. When these facts are proved, the debtor is entitled to show that an adjudication ought not to be made because he is able to pay his debts, or that for any other sufficient cause, no order of adjudication ought to be made. The section is evidently borrowed from section 7 of the English Act of Bankruptcy, 1883 (46 and 47 Vict. Cap. 52) and the words of section 15 (1) are in themselves clear.

It is necessary now to refer to a few of the sections of the Act, as to what matters have to be decided by the Court before an order of adjudication is passed. Section 5 enacts that if a debtor commits an act of insolvency, a petition for adjudication may be presented either by a creditor or by the debtor, subject to the conditions specified in the Act. Section 6 lays down those conditions. Clauses 1 and 2 do not call for any observations in this case. Clauses 3 and 4 lay down that the debtor and a creditor respectively shall not be entitled to present a petition unless certain conditions are fulfilled. Clause 3 relating to the debtor's application requires that his debts should amount to Rs. 500 and that either he should have been arrested or imprisoned in execution of a decree or there should be a subsisting attachment of his property for the satisfaction of some decree. Clause 4 relating to the creditor's petition enacts that the debt due to the petitioning creditor should amount to Rs. 500 and shall be a liquidated sum, and further that the act of insolvency, on which the petition is grounded, should have occurred within 3 months before the presentation of the petition.

As already observed the debtor should have committed an act of insolvency before a petition could be filed either by him or by a creditor. Section 4 lays down in what cases an act of insolvency would be committed.

It is unnecessary to refer to the various acts enumerated in the section. It is enough to refer to clause (*f*) which says that if the debtor petitions to be adjudged an insolvent under the provisions of the Act, that would amount to an act of insolvency. In this case, therefore, the petitioner had

committed an act of insolvency and his debts amounted to Rs. 500. He was therefore entitled to present the petition.

The further procedure is laid down in sections 12 and 14 to 16. Section 12 provides that a date is to be fixed for the hearing of the petition and notices to certain parties should be issued. Section 14 is of importance for the decision of this case. It lays down that the Court shall require proof that the creditor or the debtor is entitled to present the petition, that the required notices have been served and that the debtor has committed the act of insolvency alleged against him. Other directions are contained in clauses 2 to 4 of section 14, which I shall return to immediately. Section 15 says that "where the Court is not satisfied with the proof of the right to present the petition or of the service of notice or of the alleged act of insolvency" (of all of which section 14 requires proof to be adduced) the petition should be dismissed. Section 16 enacts that where a petition is not dismissed (as required by section 15 in the cases referred to therein) and the debtor is unable to propose any composition or scheme which shall be accepted by the creditors and approved by the Court. The Court shall make an order of adjudication.

It will be observed from what has been adverted to thus far that the matters of which proof is explicitly required by the provisions of the Act are only those set out in section 14 (1) which have been already mentioned. Are there, then, any other matters which the Court has to find proved before an adjudicating order is made? The appellant's contention is that there are, and reliance is placed on the provisions of clauses 2 and 3 of section 14 and clause (a) of section II (1). The latter section requires that every insolvency petition presented by a debtor shall contain *inter alia* a statement that the debtor is unable to pay his debts. It is argued that it is to be inferred from this provision that the Court should find before an order of adjudication is passed that the debtor is unable to pay his debts. Section 14 (3) says that "the Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition." Section 14 (2) provides that "the Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors

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as appear at the hearing, and the creditors shall have the right to question the debtor thereon." There is no doubt that both these clauses require that the acts referred to therein should be done on the date when the petition for adjudication is heard. But it does not follow that every matter which forms the subject of the examination of the debtor should be decided before an order of adjudication is made. The examination is to be comprehensive with respect to the matters it may embrace. All his conduct and all his dealings with his property are the subject matter of his examination.

In my opinion, the object of this provision as of the public examination of the debtor in England, is to obtain information at as early a stage as possible, of the property and the whole conduct of the debtor in their relations to the insolvency proceedings. They are not all of them necessary for deciding the application for adjudication. They would be material in later stages of the proceedings when the debtor applies for his discharge and then they would be most valuable to enable the creditors to oppose his discharge. What the Court has to decide before an order of adjudication must be gathered from the sections which expressly deal with that point. Again section 14 (3) certainly requires the Court to grant time to the debtor or any creditor to produce evidence in certain cases. In what cases is it to do so? The answer given by the section is, the evidence for the production of which time is asked for must appear to the Court to be necessary for the disposal of the petition. The question therefore is, what is necessary for the disposal of the petition? I may add that the debtor or the creditor asking for time must show sufficient cause to induce the Court to grant time. That there may be other questions for decision than the mere fact of the commission of an act of insolvency and the service of notices and the right of the creditor or debtor to present the petition, I do not doubt. Thus in an application by a creditor the debtor is entitled to show that he is able to pay his debts, or there is some other sufficient cause why the Court should not make the order.

It has been repeatedly held that the Court is entitled to see that proceedings in insolvency are not made an instrument of oppression by the creditor or dishonest evasion to pay his debts by the debtor. The debtor may also show that he within a

reasonably short time, would be able to enter into an arrangement to satisfy all his creditors. It may also be shown by a creditor that the application for adjudication is really a bogus or sham proceeding.

It is not desirable that I should attempt to make an exhaustive statement of other reasons which may induce a Court not to make an adjudication order.

I am of opinion that the Court is to give time for the production of evidence only in the class of cases that I have just indicated. Section 14 does not lend countenance to the argument that the Court is bound to decide questions relating to the conduct of the debtor or to the genuineness of the debts mentioned by him in his schedule, or to questions relating to his honesty in his dealings with his creditors. Section 11 (1) (*a*) requires that the debtor in his petition should make a statement that he is unable to pay his debts. But it is important to know that none of the sections 14, 15 and 16 lays down that the Court is to decide whether he is able to pay his debts or not, or whether it is to require proof of a statement by the debtor that he is unable to pay his debts. According to the English Bankruptcy Act, 1883, section 4, a declaration by a debtor that he is unable to pay his debts is itself a commission of an act of insolvency and section 8 of that Act provides that a debtor's petition shall allege that the debtor is unable to pay his debts. According to that Act, a receiving order is to follow immediately on the presentation of a petition of insolvency by the debtor. The policy of the Provincial Insolvency Act, 1907, departing from that which underlies the provisions of the Civil Procedure Code, 1882, with respect to insolvency proceedings in moffussil Courts is not to enquire into the whole conduct of the judgment-debtor and the questions relating to his indebtedness at one and the same time. That is what is required by sections 351 and 352 of the Civil Procedure Code, 1882. The scheme of Act III of 1907 is to make an order of adjudication at first and then to make a full enquiry into all matters connected with the insolvency before the question of the discharge of the debtor is decided. Section 26 of the Act authorises the receiver appointed by the Court to apply for the striking out of any debt that may have been improperly entered by the insolvent in his schedule. The concealment of any property by the debtor and omitting it in

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the schedule may be enquired into under sections 43 and 44. All these are questions which are considered material in deciding whether an order of discharge should be passed in favour of the petitioner and whether any punishment should be inflicted on him for fraudulent conduct. The matters to be decided at the time of adjudication are specified in the sections already referred to, but besides those specific matters, the Court has power to refuse to make an order of adjudication on certain other grounds, such as the prevention of abuse of the process of the Court and of the unnecessary harassing of a debtor by a creditor. The question whether all the debts entered in the schedule are real or fictitious is not, in my opinion, one of those matters. Nor is the question whether the debtor has concealed property belonging to him, by omitting it from his schedule.

The view which I have just expressed is in accordance with the decision of the Calcutta High Court in *Udai Chand Maiti* v. *Ram Kumar Khara*(1) as also with the judgment of the Allahabad High Court in *Girwardhari* v. *Jai Narain*(2). In the latter case, the learned Judges disapproved, and rightly if I may say so, of a former decision of another Bench of the same Court.

Two decisions of the Burma Chief Court have been referred to on behalf of the appellant which contain the same view of the scope of the enquiry as that adopted in the earlier decision of the Allahabad High Court and which was dissented from in the later case already referred to.

It is urged that the appellant was not permitted to cross-examine the petitioner at his examination on the date of hearing. But this allegation is unsupported by anything that appears on the record or by any affidavit of the appellant.

Having regard to the observations of the learned District Judge in the Court below it may be that the appellant was not allowed to adduce certain evidence that he wished to. But as the matters that he alleged in his petition and which apparently he wanted to prove by evidence, were not proper to be enquired into at the time of adjudication, the District Judge was not wrong in refusing to go into them at that stage.

I am of opinion that, for these reasons, the judgment of the Lower Court is right and I would dismiss the appeal with costs.

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(1) (1910) 15 C.W.N., 213 (2) (1910) I.L.R., 32 All., 645

AYLING, J.—I concur in the order proposed by my learned brother The chief contention raised on behalf of the appellant is that it was the duty of the District Judge to enquire and presumably determine whether the petitioner was or was not able to pay his debts This is a not very accurate summary of the allegations contained in the appellant's counter-petition, dated 30th June 1908, the actual allegations therein being that the debtor had included fictitious debts in his schedule and concealed one item of property. I can find nothing in the Provincia Insolvency Act, 1907, which would render it obligatory on the District Judge to enquire into allegations of this nature before passing an adjudication order. Section 14 of the Act compels him to do two things, and two things only. He must satisfy himself on the points marked (*a*), (*b*) and (*c*) in sub-section (1) and he must further examine the debtor in the presence of the creditors and allow the latter an opportunity of cross-examining the debtor. These requirements of the law appear to have been complied with in the present case The only material question here in the three points (*a*), (*b*) and (*c*) is as to the amount of the debts and we must accept the statement of the learned District Judge, that this was admitted by the creditor. It is admitted that the debtor was examined and it is not shown that the creditor was not given an opportunity of cross-examining the debtor.

The third sub-section referring to the Court granting time for the production of evidence is made contingent upon sufficient cause being shown which is tantamount to saying that it is within the discretionary power of the Court.

I would not be understood as saying that the Court is *precluded* from taking evidence and determining other points than those indicated As pointed out in *Girwardhari* v. *Jai Narain*(1), such a power which may be necessary to prevent abuse of the process of the Court may be held to be inherent, and may also be based on section 47 of the Act read with section 151 of the Civil Procedure Code, 1908. It is possible to imagine cases in which so much might be elicited in the course of the examination and cross-examination of the debtor that the Court would be well advised to complete the enquiry and dismiss the petition at the preliminary stage. Such cases would however be rare and in the majority of cases as pointed out in the abovequoted

(1) (1910) I.L.R., 32 All., 645.

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Having regard to the observations of the learned District Judge in the Court below it may be that the appellant was not allowed to adduce certain evidence that he wished to. But as the matters that he alleged in his petition and which apparently he wanted to prove by evidence, were not proper to be enquired into at the time of adjudication, the District Judge was not wrong in refusing to go into them at that stage.

I am of opinion that, for these reasons, the judgment of the Lower Court is right and I would dismiss the appeal with costs.

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(1) (1910) I.L.R., 32 All., 645.

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inquiry into other matters than those which the Court is bound to determine would be better postponed to a later stage. Certainly I see no reason to hold that this is one of the exceptional cases.

The order of the learned District Judge appears to me correct and I agree with my learned brother that the appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. November 8 and 9

NEECHOOH PARU AMMA (PLAINTIFF), APPELLANT,

v.

CHATHANADATH KALASSERI KUNHIKANDAN *alias* MOOTHORAN AND FOUR OTHERS (DEFENDANTS NOS 1, 2, 6, 13 AND 14), RESPONDENTS.*

Malabar Tenants' Improvements Act (Madras Act I of 1900), s. 5, 6, 9 to 18 and 19—Right to compensation—Contract to the contrary, made before 1886, effect of—Distinction between restriction of right to make improvements and of right to the value of improvements—Validity of each restriction.

Under the provisions of the Malabar Tenants' Improvements Act (Madras Act I of 1900), a tenant is entitled to the full value of his improvements according to the rates provided in sections 9 to 18, section 19 does not cut down his right under sections 5 and 6 to the value of his improvements according to the rates prescribed in the Act even where a contract was entered into before 1st January 1886, limiting his right with respect to the amount of compensation claimable by him Accordingly a restrictive provision in a document limiting the amount of compensation cannot be enforced.

But contracts made prior to January 1886 limiting the right to make improvements are not affected by section 19 and are valid.

Kozhikot Pudiya Kovilagath Sreemana Vikraman v. Chundayil Modathil Ananta Pattar [(1911) I.L.R., 34 Mad., 61], followed.

Held, on a construction of the following provision in a *kanom* deed of 1884, "If I make *chamayams* (or buildings) thereon exceeding Rs 25 in value I shall only remove and take them at the time of surrender and shall not demand the value of improvements therefor"—that the meaning of the clause was not to

* Second Appeal No. 540 of 1910.

restrict the *kanomdar* from building but to restrict his right to the amount of compensation if he built, to Rs. 25, if he is content to take it, regard being had to the absence of any right on the landlord to require the tenant to remove any building worth more than Rs 25.

The provision for removing is merely a recognition of the right which a *kanomdar* has always possessed to remove any improvements made by him.

Angammal v. *Aslami Sahib* [(1911) 21 M L.J., 891], referred to.

SECOND APPEAL against the decree of A. N. ANANTARAMA AYYAR, the Subordinate Judge of Calicut, in Appeal No. 660 of 1909, presented against the decree of P. RAMAN, the Principal District Munsif of Calicut, in Original Suit No. 589 of 1908.

The facts of this case are set out in the judgment.

J. L. Rozario for the appellant

P. Kundu Panikar for third respondent.

C. V. Anantakrishna Ayyar for first, second and fourth respondents.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The question raised in this case is whether the defendants holding the lands sought to be recovered in the suit on a *kanom* executed in the year 1884 are disentitled under the terms of the *kanom* instrument, Exhibit A, to recover compensation for *chamayams* or buildings worth more than Rs 25. The first defendant is the purchaser in court-auction of the *kanom* right. The second defendant is a sub-mortgagee under the original *kanomdar* holding under a document executed by him before the date of Exhibit A (Exhibit A being the renewal of an earlier *kanom*). The sixth defendant is found by the Lower Appellate Court to have constructed his buildings worth more than Rs 25 about the year 1883. The thirteenth and fourteenth defendants who also raised buildings worth more than Rs. 25 obtained an assignment of a portion of the lands included in the *kanom* in 1907, shortly before the suit. The Lower Courts held that the defendants mentioned above were not bound by the terms of Exhibit A which, they held, would disentitle them to claim a larger compensation than Rs. 25. The grounds on which this finding is based are—

(1) that Exhibit B, the *melcharth*, executed in favour of the plaintiff authorised him to pay the value of buildings erected by the prior holders without any limitation,

(2) that the *jenmi*, the seventeenth defendant, in bringing to sale the rights of the original *kanomdar* under Exhibit A described them as "the *kanom kuzhikur* and *chamayam* and all

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BENSON AND SUNDARA AYYAR, JJ.

other rights thereon" over the property in question possessed by the *kanomdar*, and

(3) that the first defendant who before his purchase of the *kanom* took the mortgage Exhibit III in 1887 from the original *kanomdar* had no notice of any restriction contained in the *kanom* document of the *kanomdar's* rights to compensation for buildings.

We are of opinion that none of these grounds can support the conclusion arrived at by the Lower Courts. Exhibit III states that the *kanom* document, *i.e.*, Exhibit A, was handed over to the mortgagee, who must therefore be held to have had full notice of the provisions of Exhibit A. The sale certificate, Exhibit I, cannot be held to confer on the first defendant anything more than the rights which the judgment-debtor, whose rights he purchased, actually possessed. The provision in Exhibit B authorising the plaintiff to pay the value of *chamayams* to which the *kanomdar* might be entitled, could not enhance the rights possessed by the *kanomdar* under his own title-deed. Mr. Anantakrishna Ayyar for the respondents, however, seeks to support the judgment of the Lower Courts on the ground that the provision in Exhibit A restricting the *kanomdar's* rights to make *chamayams* and recover compensation for them, is not enforceable on account of the provisions of the Malabar Tenants' Improvements Act, I of 1900. In *Kozhikot Pudiya Kovilagath Sreemana Vikraman* v *Chundayil Modathil Ananta Patter*(1) this Court held that under the provisions of that Act, a tenant is entitled to the full value of his improvements according to the rates provided in sections 9 to 18, and that section 19 does not cut down his right under sections 5 and 6 to the value of his improvements according to the rates prescribed in the Act even where a contract was entered into before the 1st January 1886 limiting his right with respect to the amount of compensation claimable by him. We adopt the law as laid down in that judgment; and, if Exhibit A can be rightly held to have merely limited the amount of compensation to which the *kanomdar* was entitled for buildings, we are of opinion that the restrictive provision in that document cannot be enforced. Mr. Rozario for the appellant contends that the document really

(1) (1911) I.L.R., 34 Mad., 61.

goes further and restricts the *kanomdar's* right to erect buildings at all if they are worth more than Rs 25 and he argues that section 19 of the Act does not render such a contract entered into before the 1st of January 1886 invalid. The respondent contends that under sections 5 and 6 the *kanomdar* is absolutely entitled to the value of all improvements, and that section 19 which does not expressly provide that a contract before the 1st January 1886 restricting the right to make improvements is valid cannot be taken to modify the provisions of sections 5 and 6. We are unable to uphold this argument. We are bound to construe the Act so as to give some effect to every section of it. On the construction contended for by Mr. Anantakrishna Aiyar section 19 would be unnecessary, and, if we are to regard it as enacted *ex abundante cautela* as suggested by him, then the words "after the 1st day of January 1886" qualifying the contracts referred to in the section would be unnecessary if his construction be maintained. We are bound to hold that contracts prior to January 1886 limiting the right to make improvements are not affected by the section. It may be that section 19 did not intend to pronounce any agreements between the *jenmi* and his *kanomdar* as to what should be regarded as improvements suitable to the holding. invalid. The question then that we have to decide is what is the true nature of the provision in Exhibit A with regard to buildings to be erected by the *kanomdar.* The provision is in these terms: "If I make *chamayams* thereon exceeding Rs. 25 in value, I shall only remove and take them at the time of surrender, and shall not demand the value of improvements therefor." The meaning of the agreement in our opinion is that the tenant's only right with respect to buildings of more than Rs. 25 in value which he might erect is to remove them and that he is not entitled to demand their value. The provision for removing is merely a recognition of the right which a *kanomdar* has always possessed to remove any improvements made by him. See: *Angammal v. Aslams Sahib*(1). We are of opinion that the agreement that he should not demand the value of buildings worth more than Rs. 25 means nothing more than that he should not demand more than Rs. 25 for any buildings erected by him. We do not

(1) (1911) 21 M.L.J., 891.

PARU AMMA v. KUNHIKANDAN

BENSON AND SUNDARA AYYAR, JJ.

think that it was intended that, if the tenant was content with Rs. 25 for a building worth more than that amount, the landlord should be entitled to refuse to pay him anything for it. The object of the clause appears to be to provide a limitation on the amount which the tenant was entitled to claim for improvements and not to prevent him from constructing any buildings worth more than Rs. 25 at all. No right is given to the *jenmi* to require the removal of buildings worth more than Rs 25 and to restore the land to its condition before erection of the building. In other words, the object was not to restrain the *kanomdar* from building, but to restrict his right to compensation if he built The agreement was therefore, one regulating and restricting the amount of compensation to which the *kanomdar* was to be entitled, for buildings erected by him. The decision in *Kozhikot Pudiya Kovilagath Sreemana Vikraman* v. *Chundayil Modathil Ananta Patter*(1) is therefore applicable to the case We uphold the judgment of the Lower Appellate Court on this ground and dismiss the Second Appeal but in the circumstances without costs

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. November 9 and 10.

SAHIB THAMBI MARAKAYAR (PLAINTIFF), APPELLANT,

v

HAMID MARAKAYAR AND THREE OTHERS (DEFENDANTS), RESPONDENTS *

Suit on Foreign judgment—Foreign Court's decree—Decree for money against "firm"—Some partners not served in foreign court—No personal liability—Foreign decree enforceable only against partnership property of the partners

The general rule of law undoubtedly is that in suits where one person is allowed to represent others as defendants in a representative capacity any decree passed can bind those others only with respect to the property of those others which he can in law represent and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally

(1) (1911) I.L.R., 34 Mad., 61.

* Second Appeal No. 175 of 1910

liable The extent of the rule applicable to a case of defendants sued as partners is laid down in Order XXI, rule 50, Civil Procedure Code

SAHIB THAMBI v. HAMID.

A firm was sued in Singapore in the firm's name but only one of the partners was served and a decree was passed against "defendants" for a certain sum

On the judgment of the Singapore Court a suit was filed in British India against the individual partners of the firm and the representatives of a deceased partner

Held, that the partners who were not served in the Singapore suit were not personally liable and that no personal decree could be passed against them in the present suit, but that their partnership property, if any, is liable or the decree of the Singapore Court

Per Curiam.—The same principle is applied in suits against a Hindu family represented by its manager and in cases covered by Order I, rule 8, Civil Procedure Code, the result being that an injunction in a decree in the latter class of cases is not binding on those who are not actually parties to the record.

Sadagopachari v *Krishnamachari* [(1889) I L R, 12 Mad, 356], and *Srinivasa Aiyangar* v *Arayar Srinivasa Aiyangar* [(1910) I L R, 33 Mad, 483], referred to

SECOND APPEAL against the decree of F D.P. OLDFIELD, the District Judge of Tanjore, in Appeal No. 89 of 1909, presented against the decree of V. K DESIKACHARIAR, the Subordinate Judge of Negapatam, in Original Suit No 29 of 1907.

The plaintiff in this case obtained against the present defendants in the Supreme Court of the Straits Settlements, Singapore, the following decree —that the plaintiff do recover from the defendants the sum of $ 1,242-78 on his claim and costs to be taxed and the defendants do recover nothing from the plaintiff on their counter-claim and the plaintiff do recover from the defendants his costs of counter-claim including the costs of reference to be taxed. [Other facts are given in the judgment.]

C. V. Anantakrishna Ayyar for the appellant.

S. Srinivasa Aiyangar and *T. V. Gopalasami Mudaliyar* for first, second and fourth respondents.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The plaintiff obtained a decree in suit No. 107 of 1904 on the file of the Supreme Court of Singapore against M.L.V. Sahib Malim & Co for money due to him from the defendants in that suit. The plaintiff alleges that one L. V. Marakayar (the father of the first defendant and the husband of the second defendant in the present suit), the third defendant and the fourth defendant in the present suit were the

SAHIB THAMBI v. HAMID.

BENSON AND SUNDARA AYYAR, JJ.

persons constituting the partnership of M.L.V. Sahib Malim & Co., that the third defendant defended the suit on behalf of the firm and that a decree was passed by the Supreme Court against the firm. The present suit is based on the judgment of the Singapore Court and is for the recovery of the amount due under that judgment. The plaint alleges that L. V. Marakayar and the fourth defendant were aware of the proceedings in the Singapore Court, and that the suit was defended by the third defendant with their consent. The plaintiff's case is that the judgment of the Singapore Court is binding on the first and second defendants as representatives of L. V. Marakayar and on the fourth defendant, though it is admitted that notice of the suit was not served on L. V. Marakayar or the fourth defendant. The relief asked for is against the first and second defendants as representatives of L. V. Marakayar and against the third and fourth defendants personally and not against any property in their hands belonging to the partnership firm of M. L. V Sahib Malim & Co. In fact it is not alleged that there are any partnership assets in their possession. Defendants Nos. 1, 2 and 4 denied that they were partners of the third defendant but the Lower Courts have found that they were and that finding has not been attacked before us. The Lower Courts have dismissed the suit, upholding the defendants' contention that the Supreme Court of Singapore had no jurisdiction to pass a decree against L. V. Marakayar and the fourth defendant as they were not residing there either permanently or at the time of the suit and owed no allegiance to the Straits Settlements. The plaintiff's contention that the fourth defendant was at Singapore at the time of the institution of the suit has been negatived by the Lower Courts and we accept that finding. The plaintiff who has appealed against the dismissal of the suit, contends that as L. V. Marakayar and the fourth defendant have been held to have been partners of the third defendant at Singapore and as the suit related to money due on partnership dealings, the judgment of the Supreme Court is binding on all the defendants We consider it unnecessary to decide the question whether the judgment could be held to bind the first, second and fourth defendants to any extent for we are clearly of opinion that we must uphold the contention of Mr. S. Srinivasa Aiyangar, the learned vakil for the respondents, that the

SAHIB THAMBI v. HAMID.

BENSON AND SUNDARA AYYAR, JJ.

judgment could not bind them in any event with respect to partnership property in their hands, and it is not alleged, as already observed, that they are in possession of any such property. The general rule of law, undoubtedly, is, that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed can bind those others only with respect to the property of those others which he can in law represent and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable This is the principle applied in suits against a Hindu family as represented by its managing member and in suits to which Order I, rule 8 of the Civil Procedure Code, 1908, is applicable It has consequently been held that an injunction in a decree in the latter class of cases is not binding on those who are not actually parties to the record. See. *Sadagopachari* v. *Krishnamachari*(1) and *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar*(2)

The principle is recognized in England in partnership suits in Order 48-A, rule 8, Judicature Act, which lays down that where a judgment or order is against a firm, execution may issue only against any property of the partnership so far *as partners who are not individually served and those who have* not appeared are concerned. In the Civil Procedure Code of 1908 provision has been made in this country for suing a partnership by its firm name in Order XXX. Order XXI, rule 50, corresponds to rule 8 of Order 48-A, in the English Judicature Act. The judgment of the Supreme Court was against the firm and no decree was passed against L V. Marakayar or the fourth defendant individually There is no reason for construing it as creating a larger liability against them than to make the partnership property in their hands liable. It is unnecessary to consider whether if it purported to do so, effect would be given to such a decree in British India according to the principles of Private International Law. The Subordinate Judge apparently finds that L. V. Marakayar and the fourth defendant assisted the third defendant in defending the Singapore suit and the District Judge seems to adopt that finding. Mr. Srinivasa Aiyangar impugns that finding, but

(1) (1889) I.L.R., 12 Mad., 356. (2) (1910) I.L.R., 33 Mad., 4?3

SAHIB THAMBI v. HAMID. — BENSON AND SUNDARA AYYAR, JJ.

is unnecessary to examine its correctness, as it cannot carry the appellant's case further for the conduct of L. V. Marakayar and the fourth defendant would not amount to more than an attempt to escape the liability that a decree against the third defendant as representing the firm would cast on them. Mr. Ananta-krishna Ayyar for the appellant relies also on the fact that the third defendant made a counter-claim in the suit, but this again can be referred only to his representative capacity. We must hold that the plaintiff is not entitled to the decree he asks for against the first, second and fourth defendants. We dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. November 10 and 24

AMBALAM PAKKIYA UDAYAN (FIRST DEFENDANT), APPELLANT,

v.

RIGHT REV. J. M. BARTLE, S.J., D.D., AND TEN OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 10), RESPONDENTS.*

Church—Prevailing form of worship for sixty years, primâ facie the original form—Right to manage—Usage alone not the test—Canon law may be invoked—One trustee cannot eject another—Repudiation by one trustee, good ground for his removal—Removal, amendment of plaint for, allowed, to avoid further litigation—Civil Procedure Code (Act XIV of 1882) sec. 30—Defendants on record objecting to represent others—jurisdiction of court to allow—Limitation Act (IX of 1908), sec. 10—No limitation against one holding properties as trustee—Whole income used, evidence of dedication of lands—Evidence Act (I of 1872), sec. 57—Only proof of notorious facts of public history dispensed with.

When it is found that for a period of more than sixty years before the defendants' (parishioners') secession, the Roman Catholic form of worship prevailed in their parish church the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro-Chaldean at the inception.

As to the right of management of a particular Roman Catholic Church, and its properties, besides usage, other things, such as the rights of ecclesiastical authorities according to the canon law can be looked to, though in some churches on the West Coast, parishioners have more or less control over the management of the properties. A single trustee is not entitled to recover possession of the

* Second Appeal No. 982 of 1909.

properties appertaining to the trust from another trustee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust.

Even if the defendants or some of them were once entitled to be trustees along with the Vicar

Held, that they by their secession from the Catholic Church and by their repudiation of the trusts of the institution which in law works a forfeiture of their office disentitled themselves to hold the office of trustee and that they had in law no answer to a suit for their removal

Marian Pillai v *Bishop of Mylapore* [(1894) I L R, 17 Mad, 447], followed

Even if they offered to return to their allegiance to the Romish Church, it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee

Even if the plaintiff had not asked for the removal of the defendants, an amendment to that effect can be allowed in order to avoid future litigation and in the interests of the trust

A plaintiff may be allowed to sue certain defendants under section 30, Civil Procedure Code (Act XIV of 1882), as representing certain others in spite of the objection or refusal of the defendants on record to represent the others, the consent of the defendants on record not being necessary

In re Andrews v *Salmon* [(1888) Weekly Notes, 102], followed

Where a defendant claims to hold certain properties as a trustee and not as his own, there is no period of limitation within which a suit must be brought to recover them on behalf of the trust [Limitation Act (IX of 1908), section 10] The right to the properties of the trust must go with the right to the office of trustee.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram* [(1900) I.L R 23 Mad, 271 (P.C)] and *Gossami Sri Gridharji* v. *Romanlalji Gossami* [(1890) I L.R, 17 Calc, 3 (P C.)], followed

The fact that the entire income of certain properties has always been utilised for a church is very good evidence that the properties belong to it.

No deed of endowment is necessary to prove a dedication of certain properties in favour of a trust.

Under section 57, Evidence Act, the Court could dispense with evidence only of what may be regarded as notorious facts of public history, and cannot treat letters though 75 years old without any sort of legal proof, as proof of where certain missionaries were living or when they died

"Taylor on Evidence," tenth edition, volume II, paragraph 1785, and "Wigmore on Evidence," volume III, section 1699, referred to.

SECOND APPEAL and memorandum of objections against the decree of F. H HAMNETT, the acting District Judge of Madura, in Appeal No. 409 of 1908, presented against the decree of S. RAMASWAMI AIYANGAR, the Subordinate Judge of Madura East, in Original Suit No. 34 of 1906.

The facts of this case appear fully in the judgment.

T. R. Ramachandra Ayyar, *T. R. Krishnaswami Ayyar* and *M. Subrahmanya Ayyar* for the appellant.

J. L. Rozario and *K. R. Subrahmanya Sastri* for first and second respondents.

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JUDGMENT.—The suit in this case was instituted by the Bishop of Trichinopoly and the Vicar of the Church of Three Kings in the village of Pallithamam in the district of Madura for a declaration that the church and its properties have been dedicated to, and stand impressed with trusts for the worship of God in accordance with the doctrine and discipline of the Roman Catholic Church, that the second plaintiff is the trustee of the church and its properties subject to the supervision and control of the first plaintiff and for possession of the same from the defendants, who unlawfully took possession about the year 1902 or 1903. The defendants are Christians of the village who, according to the plaintiffs were formerly Roman Catholics, but who seceded from their allegiance to the Roman Church about the year 1902 and became members of the Syro-Chaldean Church The plaint alleges that the defendants never had any right of management over the church or its properties while they were in communion with the Church of Rome. Leave was obtained to implead the defendants as representing all the Christians of the Pallithamam village. The defendants denied that the church was ever dedicated to worship according to Roman Catholic doctrines, or that the villagers ever were followers of Roman Catholicism, or that Romish priests ever officiated in the church. They also denied the plaintiffs' right of supervision and management and pleaded that the villagers themselves were the trustees and managers. They admitted that they were using the incomes of certain lands set out in schedule II of the plaint for the expenses of the church, but denied that the lands themselves belonged to it. They contended that the claim for the recovery of certain moveables mentioned in the plaint was barred by limitation. The Subordinate Judge who tried the suit found that the choir of the church was constructed under the directions of Father Bertrand, a Roman Catholic priest, about the year 1839 and that it was dedicated for Roman Catholic worship. He held that the Vicar was entitled to manage the church and its properties under the supervision of his ecclesiastical superiors and passed a decree for possession as prayed for except of the lands which, he held, were not proved to belong to the church though the income was utilised for the church. He came to the conclusion that the defendants' contention that they never

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were Roman Catholics, was absolutely false and that they seceded from Romish allegiance about the year 1902. The District Judge confirmed the decree of the Subordinate Judge except with regard to the moveables the claim to which he held to be barred. The first defendant preferred this Second Appeal and the plaintiffs have filed a memorandum of objections with respect to the lands and the moveables. The case has been argued at great length for the appellant, but we have come to the conclusion that the findings of the Lower Courts as to the nature of the trust to which the church and its properties were dedicated must be uphold. We also accept the finding of the Lower Courts that the Christians of Pallithamam were not the only persons entitled to worship in the church, and that the Christians of other surrounding villages were also entitled to do so. On this finding it is not contended for the appellant that the defendants would be entitled to have the trusts of the institution altered so as to convert the church into one for carrying on worship according to the tenets of the Syro-Chaldean faith. The decision in *Bishop Mellus* v *The Vicar Apostolic of Malabar*(1) would admittedly not be applicable to such a state of things. It is contended that the findings mentioned above are not legally sustainable. The admission of a number of documents, put in for the plaintiffs as evidence, is impeached as contrary to the rules of evidence. It is urged that Exhibits A and G, which are printed letters of the Jesuit Fathers, were admitted without any sort of legal proof and used as evidence of facts which are not matters of public history. This argument is in part well-founded. The Subordinate Judge observes that Exhibit A series consisting of printed letters of the priests of the Jesuit Mission in the Madura district, dated about seventy-five years ago, are books of reference under section 57 of the Evidence Act, and that they may be relied on with reference to "the matter of the history of Christianity and especially of the Roman Catholic Mission which is surely a matter of public interest." The rule of law as stated may not be open to exception but in applying it, he did not restrict himself strictly to their admission to prove facts of public history. The letters of the Jesuits were regarded in the Ramnad partition case as evidence of the history

(1) (1879) I L R., 2 Mad., 295.

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of the Madura district and of the Ramnad Zemindari, but it would be going too far to hold that they could be relied on to prove where certain particular missionaries were living or when they died. The court can dispense with evidence only of what may be regarded as notorious facts of public history. See: Taylor on Evidence, tenth edition, volume II, paragraph 1785 and Wigmore on Evidence, volume III, section 1699. With regard to B and C series and some other documents the principal objection urged is that they should not have been received as there was no satisfactory explanation for the non-production of their originals; but we are of opinion that this is a matter in which much weight should be attached to the opinion of the court trying the suit in the first instance, and we should be slow to reject evidence admitted by that court after satisfying itself that the party adducing secondary evidence was not in a position to produce the originals. There was evidence that the plaintiffs were not aware where the originals of these documents were, if they were in existence at all. There was nothing to show that this statement was incorrect. We must hold that the Subordinate Judge was not wrong in admitting them. Although we are of opinion that the letters A series were used to prove facts which they could not legitimately be used to prove we do not think we should interfere with the findings of the Lower Courts on that account as they were referred to only to prove that certain missionaries were living at Pallithamam when the church was being built and interested themselves in its construction. We do not think that the exclusion of these letters would have affected the conclusion arrived at by the Lower Courts. It is further contended that the evidence does not show that the church in question came into existence for the first time in 1839, that there is no evidence what ritual was being followed before that year, and that therefore the use of it for worship according to the Syro-Chaldean form cannot be condemned as contrary to the original trusts of the institution. But, when it is found that for a period of more than 60 years before the defendants' secession the Roman Catholic form of worship prevailed the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro-Chaldean at the inception and of this there is admittedly not a shred of evidence. We must therefore hold that the declaration

that the church was dedicated to the worship of God according to Roman Catholic ritual and that it is subject to the jurisdiction of the Bishop of Trichinopoly was rightly granted. We have now to deal with the question of the right to the management of the church and its properties. Mr. Ramachandra Ayyar for the appellant, strongly contends that the decision of this question must depend upon the proof of the usage with reference to the 'particular church and that the Lower Courts have not rested their finding on the usuage of the institution, but upon the rights of the ecclesiastical authorities according to the Canon law. The learned pleader in our opinion is not correct in the position taken up by him that the right of management could not be established except by proof of usage. With regard to a Hindu religious foundation, usage is what determines the right of trusteeship in the absence of any direct evidence to prove the rules established by the founder, but it must be remembered that the Hindu law prescribes no special rules with respect to the management of religious institutions. There is no reason for holding that the Canon law cannot be invoked as a guide in deciding questions respecting temporal rights in Roman Catholic Churches. It is no doubt the case that in some churches on the west coast the parishioners have more or less control over the management of the properties, but we are not concerned with the question how far the Canon law may be modified by the usage of any particular church in this country. Our attention has not been drawn to any authority in support of the broad proposition contended for by the appellant. On the evidence too, the Subordinate Judge found that the plaintiffs were in possession of the church and its properties till February 1902, and were then dispossessed by the defendants. The keys of the church building itself were in the custody of an officer styled Koil Pillay and he was appointed by the Vicar. We can find no reason for not accepting that finding. The moveable properties of the church must also be held to have been in the Vicar's possession till February 1902. With respect to the funds of the church consisting chiefly of fees and offerings derived from worshippers, the plaintiffs' witnesses admitted that they were kept and expended by three of the parishioners, but said that they did so with the permission and under the control of the Vicar. The

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Subordinate Judge apparently accepted this statement, though he does not expressly say so The District Judge's finding is not very clear on this point. He considered it unnecessary to decide whether the Vicar was the sole trustee or not, as he was of opinion that the Vicar, who was at least one of the trustees, was entitled to sue for the recovery of the properties of the trust. He considered that the defendants used probably to exercise some sort of control over the church funds and that they might have some right in the trusteeship. The Judge is mistaken in his view that a single trustee is entitled to recover possession of the properties appertaining to the trust from another trustee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust.

The position of the defendants is not quite clear. They do not say that they are entitled to elect certain of their members and, if so, how many, to manage the trust along with the Vicar. But we think that the defendants by their conduct have in any event disentitled themselves to hold the office of trustee. They have seceded from the Roman Catholic religion and repudiated the trusts of the institution. There can be no doubt that they could have no answer to a suit for their removal See *Marian Pillai* v. *Bishop of Mylapore*(1). Even if they offered to return to their allegiance to the Romish Church, it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee. It is contended that, as the plaintiffs have not asked in their plaint for the removal of the defendants from the trusteeship, we ought not in this suit to direct their removal. We think we might hold that a complete repudiation by a trustee of the trusts on which he is bound to hold the properties committed to his charge for the benefit of others would work a forfeiture of his office so as to entitle the court to decree his eviction from the properties in his possession. No authority to the contrary has been cited at the hearing. The plaintiffs are desirous of avoiding further litigation for getting a relief which they are undoubtedly entitled to. We consider it unnecessary to decide definitely whether there is any substance in the technical objection of the appellant as we are prepared to direct

(1) (1894) I.L.R., 17 Mad., 447.

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an amendment of the plaint by the addition of a prayer for the removal of the defendants from the management of the trust properties, if necessary. It remains to notice an argument of Mr. Ramachandra Ayyar that the defendants on the record refused to defend the suit on behalf of the other Christians of the village of Pallithamam and that the decree is therefore not binding on the whole community of Christians in that village. But under section 30 of the Code of Civil Procedure the Court has the power to allow a plaintiff to sue some persons as representing themselves and others having the same interest in the subject matter of the suit. The consent of the defendants on record is not necessary to enable the Court to do so. In *In re Andrews* v. *Salmon*(1), KAY, J., made the necessary order though the defendants actually on record objected. If a different view were held, it would be in the power of parties to prevent a plaintiff from availing himself of the benefit of section 30, Civil Procedure Code

We dismiss the Second Appeal with costs. We direct the plaint to be amended in the manner mentioned above.

The Memorandum of Objections relates to the claim to the lands described in schedule II to the plaint and to the moveables. The District Judge disagreeing with the Subordinate Judge dismissed the claim for moveables on the ground that it was barred by limitation. We entirely fail to see how the plea of limitation could be upheld when the defendants admitted that the properties belonged to the church and claimed to hold them as trustees and set up no right of their own to them. The right to the properties of the trust must go with the right to the office of trustee. See *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(2) and *Gossami Sri Gridharji* v. *Romanlalji Gossami*(3). The claim must therefore be allowed and the plaintiffs will have a decree for all the properties referred to in schedule III attached to the plaint (amended as per order of the Court in *Bartle Ambalam* v. *Pakkiya Udayan*(4).

With respect to the lands both courts have held that they do not belong to the church, but the facts found or admitted are inconsistent with this conclusion. It is admitted that the entire income has always been utilised for the church which is very

(1) (1888) Weekly Notes, 102
(2) (1900) I.L.R., 23 Mad., 271 (P.C.)
(3) (1890) I.L.R., 17 Cal., 3 (P.C.)
(4) Civil Mis. Petition No. 597 of 1912.

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good evidence that the lands belong to it. It is further admitted that the Government revenue has been paid out of church revenues and that in the accounts kept by the defendants (Exhibit V) the lands are described as belonging to the church. The first defendant in his evidence and one of his witnesses admitted that they belonged to the church. The District Judge was under the impression that the plaintiffs were bound to prove some deed of endowment dedicating them to the church or their actual possession of the lands. This is clearly wrong. The fact that the patta is in the name of the first defendant who does not claim it as his own, is no evidence of any title in the villagers. The defendants have no evidence to prove their title and the facts admitted necessarily prove both title and legal possession in the church. The decrees of both Courts must therefore be modified by directing that the plaintiffs be put in possession of the lands claimed in the plaint. The plaintiffs are entitled also to mesne profits from the date of plaint to this date and further mesne profits up to the delivery of possession. The Subordinate Judge will hold an enquiry into the question of the amount of mesne profits and pass a decree for the amount he may find the plaintiffs entitled to. The plaintiffs are entitled to the costs of the memorandum of objections also.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

NARAYANA KUTTI GOUNDAN (FIRST PLAINTIFF), APPELLANT,

v.

PECHIAMMAL *alias* MAHALI AMMAL AND TWO OTHERS (DEFENDANTS NOS. 1 AND 2 AND SECOND PLAINTIFF), RESPONDENTS.*

1911, November 29 and December 20.

Mortgage—Redemption by reversioners after foreclosure decree—Subrogation—Transfer of Property Act (IV of 1882), sec. 91.

While a sale in execution under a mortgage decree was in progress plaintiff (a stranger) paid the decree-amount into court on behalf of some of the reversioners to the property

Held, that though the mere payment of a mortgage debt by a stranger will not entitle him to the mortgagee's rights by subrogation, yet here under

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* Second Appeal No. 1095 of 1910.

section 91, Transfer of Property Act (IV of 1882), the reversioners become equally entitled to a charge over the property and they could validly assign this charge to the plaintiff by way of sub-mortgage

The English and Indian Law relating to the doctrine of subrogation compared and discussed

Per SUNDARA AYYAR, J.—

"I am on the whole inclined to hold that a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose But does it necessarily follow that when a suit is instituted by a mortgagee for sale, the reversioner has not got a sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow? I do not think I am bound to hold that his rights stand on the same footing when he claims of his own accord to redeem and when he tries to save the property for the estate upon the mortgagee attempting to sell it The right of a person interested in the payment of money which another is bound by law to pay and who therefore pays it, to be re-imbursed by the other is recognised in section 69 of the Indian Contract Act There is no reason for holding that only those who have an interest in a mortgaged property within the meaning of sections 85 and 91 of the Transfer of Property Act can be held to be interested in the payment of money due on a mortgage created by the last male owner"

SECOND APPEAL against the decree of D. BROADFOOT, the District Judge of Coimbatore, in Appeal No. 153 of 1909, presented against the decree of S. NARAYANASAMY AYYAR, the District Munsif of Udumalpet, in Original suit No. 187 of 1908.

The facts of this case are sufficiently set out in the judgment of SUNDARA AYYAR, J.

K Srinivasa Ayyangar for appellant.

The Hon'ble The Advocate-General for first respondent.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The facts necessary for the disposal of this Second Appeal may be very briefly stated. One Venkatachella Mudali hypothecated certain land to one Muthu Goundan in 1898 and died in 1904 leaving behind him two widows, the first and second defendants in this suit, and five daughters, defendants Nos 3 to 7. Muthu Goundan obtained a decree on his mortgage bond against the widows and certain purchasers from them. The property was directed to be sold in execution of the decree and, while the sale was actually going on, Narayana Kutti Goundan, one of the plaintiffs in this suit, paid the amount of the decree into court. Four of the daughters executed a mortgage bond in favour of the two plaintiffs here for the amount which the bond alleges was received from them for discharging the amount required for paying up the decree-amount due to Muthu

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Goundan. The property mortgaged under the instrument was the same as that which had been mortgaged to Muthu Goundan. The plaintiffs' suit is to recover the amount due under their mortgage bond by sale of the mortgaged property and personally from the defendants Nos 3 to 6, the executants of the bond. The District Munsif was of opinion that the daughters as reversioners having only a *spes successionis* had no such interest in the mortgaged property as would entitle them to redeem Muthu Goundan, and that the plaintiffs obtained no legally enforcible right under the mortgage to them as against the mortgaged property. He therefore refused to pass a decree for the sale of the land, but gave the plaintiffs a personal decree against the defendants Nos. 3 to 6. On appeal the District Judge confirmed the Munsif's decree holding that, though the defendants Nos. 3 to 6 must be held to have some interest in the land and might be entitled to a charge on the land against the first and second defendants, the plaintiffs who lent money to the daughters could not be held to have obtained any valid right under their mortgage The first plaintiff, Narayana Kutti Goundan, has appealed to this Court from the decree of the District Judge.

It is clear from the facts of the case that the plaintiffs lent moneys to the four daughters on the security of such interest as they would obtain in the land by redeeming Muthu Goundan's mortgage. If the daughters obtained a valid charge on the land against the widows, the defendants Nos. 1 and 2, by redeeming the mortgage, there is no reason for holding that they could not create the mortgage in question in the plaintiffs' favour charging their right.

The plaintiffs then would stand in the position of the sub-mortgagees with respect to the defendants Nos. 1 and 2 and would be entitled to sue both their mortgagors, the daughters, and the defendants Nos 1 and 2 to enforce their mortgage by the sale of the first and second defendants' right in the land. It was not suggested in the courts below that the plaintiffs lent the money merely on the personal security of the executants of the mortgage-deed. The question for decision in this Second Appeal therefore is whether the daughters who executed it obtained any charge over the land by discharging the amount due to Muthu Goundan. It is contended for the appellant, *firstly*, that they

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would stand in the shoes of Muthu Goundan by subrogation merely by discharging his debt, and *secondly*, that they were persons entitled to redeem Muthu Goundan's mortgage under section 91 of the Transfer of Property Act and by redeeming him became entitled to his right as against the first and second defendants. The first of these two arguments was put on a broader ground than the second, it being contended that, whether a reversioner under the Hindu Law is a person entitled to redeem under section 91 of the Transfer of Property Act or not, the right of subrogation was wider, and that the daughters having discharged a burden on Venkatachellam's estate in the hands of first and second defendants, the land in their possession became liable for the amount paid by them. In support of this argument, the judgment of WARRINGTON, J. in *Butler* v. *Rice*(1), was relied on. In that case, one Mrs. Rice was the owner of a house in Bristol and of property in Cardiff, which were together subject to a charge in favour of a bank to secure £450 and interest, and the title-deeds of both the properties were deposited with the bank. Mr. Rice asked the plaintiff Butler to lend him £450 for the purpose of paying off the mortgage. Mr. Butler agreed to lend the amount upon a legal mortgage for £300 of the Bristol house and a guarantee of £150 by Mr. and Mrs. Rice's solicitor, who was to hold the title-deeds for him in the meantime. The money was paid and deeds of the Bristol property which were recovered from the bank passed into the custody of the solicitor. Mrs. Rice did not know of the transaction and subsequently refused to execute a mortgage in favour of the plaintiff. Butler instituted an action against Mr. and Mrs Rice and the solicitor for a declaration that he was entitled to a charge on the Bristol property for £450 and interest. WARRINGTON, J. took the question for determination to be whether in the circumstances of the case, Mrs. Rice was entitled to hold the Bristol property discharged from the debt of £450 not one penny of which, said the learned Judge, she had paid off herself, or whether the person who paid was entitled to treat the bank's charge as still on foot in his favour. The learned Judge observes, "In the first place I find from the facts I have stated that it was not the intention of the plaintiff, nor indeed is it possible to suppose that any sensible

(1) (1910) 2 Ch 277, at p 282

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man would have such an intention, to discharge the property from the debt. There are only two questions which have to be dealt with in order to arrive at the further conclusion that in equity the debt is still kept alive. The *first* is this: is it material that the owner of the property, the mortgagor, has not requested the person who paid the money to make the payment? and *secondly*, is the plaintiff's right affected by the further intention that, when the transaction was fully carried out, his position should be secured by a legal mortgage for £300 and a guarantee of £150? On the first question it should be observed that this is not a case in which a person seeks to create a charge in his own favour. Here there was an existing charge, and the only question is whether it had been paid or kept alive. On such a question as that it appears to me that the concurrence of the mortgagor is immaterial. Her position is not affected. The only alteration in her position is that instead of owing the money to A she will in future owe it to B." Again he says, "then does the fact that the plaintiff intended, if the transaction was carried out, to have a legal mortgage on the Manor Road property only and a guarantee for the remaining £150 prevent the application of the doctrine? Plainly not. His meaning was that he should have a further security; but that is no evidence that he intended in the meantime to give up such security as a transfer of the deeds to him would give him. The evidence which he gives, which I find to be true, as to what he said at the second interview supports this, namely, that the deeds were to be taken by the solicitor and held by him for the plaintiff. Such security as that gave would be superseded by the better security to be given afterwards." It may be noted that it was not contended that her husband had any right to act on behalf of Mrs. Rice or that the solicitor was entitled to enter into any agreement on her behalf. In these circumstances, it appears to me that the judgment of the learned Judge went very far and is not supported by any previous decision of the English Courts. The learned Judge appears to hold that, though the plaintiff had no previous interest in the property to sustain his action in paying off a previous mortgage and claiming a charge for the amount paid by him, he was entitled to stand in the shoes of the bank whose charge he discharged. He observes that as there was *an existing charge* in favour of the bank the concurrence

of the mortgagor is immaterial. The learned Judge no doubt refers to the agreement between Butler and Mr. Rice and the solicitor that the deeds were to be taken by the solicitor and held by him for Butler, but it is difficult to see that this would have any bearing on the question if Mr. Rice and the solicitor had no right to act for Mrs. Rice. The decision seems almost to go the length of holding that even a volunteer who pays off an existing mortgage would be entitled to a charge on the mortgaged property for the amount he paid. The decision is not based on any agreement between Butler and the debtor that the former should have the rights of the latter. The learned Judge says that the judgment in *Patten* v. *Bond*(1) and the decision in particular of ROMER, J. in *Chetwynd* v. *Allen*(2) are consistent with the view expressed by him, "for in the case before him, as in this, the material payment was made without the knowledge and without any communication with the person who was the real owner of the mortgaged property, and, notwithstanding that, ROMER, J. held that the charge was still on foot" In *Patten* v. *Bond*(1) the money was lent at the request of trustees for the purpose of preserving the trust estate. In such cases, a right of subrogation is undoubtedly recognised in the English Law. In *Chetwynd* v. *Allen*(2) the person who claimed the right of subrogation paid the money at the request of the trustee for the owner of the property who was the trustee's wife, in order to discharge a mortgage executed on her property with her consent. He was therefore entitled to bind her interest by an agreement which he entered into for discharging that mortgage. The case is therefore not similar to *Butler* v. *Rice*(3). On the other hand, the decision in *In re Wrexham, Mold and Connah's Quay Railway Company*(4), appears to be against the view maintained by WARRINGTON, J. There, a railway company, which had issued debenture stock and whose power of borrowing was exhausted, borrowed money from their bankers to pay a half-year's interest on the stock, the bankers paying the interest warrants of the stock-holders when presented to them. Soon after this a judgment-creditor of the company presented a petition under the Railway Companies Act, 1867, and a Receiver was appointed under the petition. The Receiver

(1) (1889) 60 L T., 583 (2) (1899) 1 Ch, 353. (3) (1910) 2 Ch, 277.
(4) [(1898) 2 Ch., 663 and (1899) 1 Ch., 440 at p. 448.]

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had in his hands sufficient money to pay the next half-year's interest due to some of the stock-holders. The bank claimed priority in respect of their advances over all interest payable in respect of the debenture stock; this claim was negatived by ROMER, J. and by the Court of Appeal. RIGBY, L.J. observes, "The claim . . . is rested on a supposed subrogation and right to stand in the place of, and with the right to the securities and priorities of, the creditors who have been paid off, and this is the only claim with which I propose to deal. I do not think that any right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers has ever been allowed, or can be justified in principle." LINDLEY, M. R. and VAUGHAN WILLIAMS, L.J. took the same view. It may be observed that the bank's rights against the company as a simple creditor apart from any question of priority was not denied as the money though borrowed by the company in excess of their powers was used for discharging claims lawfully binding on the bank.

The principle governing the right of subrogation in cases where it is claimed by a person, who without any previous interest in the property discharges a mortgage on it, is expressed in Jones on Mortgages (section 874) thus: "Under the equitable principle of subrogation, one who pays a mortgage debt under an agreement for an assignment or for a new mortgage, for his own protection or for the benefit of another, acquires a right to the security held by the other." The learned author quotes a passage from a recent Georgia case [*Wilkins* v. *Gibson*(1)] which may be cited here. "It has been said that subrogation was a 'benevolent' doctrine and equity would apply it in any case in which justice required it; and under sanction of this elastic expression cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be, and we therefore hold, that a subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor he would be bound to pay or where he had some interest to protect, or where he advanced the money *under an agreement, express or implied, made either with the debtor or creditor,* that he would be subrogated to the rights and remedies of the creditor." The rule is stated in similar terms by Sheldon in his

(1) 113 Ga 31.

book on Subrogation. It has been said that "whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor, he is entitled to such substitution. But the doctrine generally adopted, and that of these very cases when limited to the point actually decided, is that a conventional subrogation can result only from a direct agreement, express or implied, made with either the creditor or debtor, and it is not sufficient that a person paying the debt of another should have merely an understanding on his part that he is to be subrogated to the rights of the creditor, though, if the agreement have been made, a formal assignment will not be necessary." The English cases do not carry the principle further.

In India the scope of the rule appears to me to be narrower still. A mere agreement either with the creditor holding a mortgage or with the debtor owing it cannot give a person lending money to discharge the mortgage a lien over the property—*see* section 54 of the Transfer of Property Act. An agreement with the creditor or the debtor may entitle him to sue him for the execution of a mortgage-deed, or a deed of assignment of the mortgage as the case may be, but mortgages for a sum of Rs 100 and upwards can be created only by registered instruments and a mere agreement to mortgage is insufficient to create a lien In England and in America, it may be that the principles of equity would enable the courts to treat an agreement for a mortgage as giving the lender an equitable interest in the property agreed to be mortgaged. But equitable interests are not recognised in this country as distinct from legal interests, though many principles of law are borrowed from the principles of English Equity Jurisprudence In this country, equitable mortgages by deposit of title-deeds are recognised only in a special class of cases referred to in section 59 of the Transfer of Property Act when the mortgages are made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. In *Gurdeo Singh* v *Chandrikah Singh*(1) the rule of subrogation is stated and it seems to be assumed that a payment made under agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security would be sufficient to entitle the lender to the benefit of subrogation. In *Jagatdhar Narain Prasad* v.

(1) (1907) 5 C.L.J., 611 at pp 631 and 632.

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him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow? I do not think I am bound to hold that his rights stand on the same footing when he claims of his own accord to redeem and when he tries to save the property for the estate upon the mortgagee attempting to sell it. The right of a person interested in the payment of money which another is bound by law to pay and who therefore pays it to be re-imbursed by the other is recognised in section 69 of the Indian Contract Act. There is no reason for holding that only those who have an interest in a mortgaged property within the meaning of sections 85 and 91 of the Transfer of Property Act can be held to be interested in the payment of the money due on a mortgage created by the last male owner. It has been held by the courts in India that a reversioner is entitled to resist a claim for probate of a will alleged to have been made by the last male owner by reason of his interest in the estate. See *Brindaban Chandra Shaha* v. *Surcsuar Shaha Paramanick*(1) and *Pattanna* v. *Ramakrishna Sastri*(2) As observed by MOOKERJEE, J. in the former case "Although a reversioner under the Hindu Law has no present interest in the property left by deceased, yet it is manifest that he is substantially interested in the protection or devolution of the estate. It is well-settled that a reversioner can sue to restrain waste. . . . The reversioner can, if he makes out a proper case, obtain an order for the appointment of a Receiver. . . . He can maintain a suit for declaration that an adoption by the female heir in possession is invalid. . . . He can also sue for a declaration that an alienation by the female heir in possession will not be operative beyond her life-time. This has now been placed beyond the possibility of dispute by the provisions of section 42 of the Specific Relief Act, illustrations (e) & (f) to which section show that such declaratory suits may be maintained. Besides it is manifest . . . that such a declaratory suit is maintainable by a remote reversioner, who would take an absolute interest in the absence of the immediate reversionary heir who has only qualified rights in the estate; and also, when the nearest reversioner has precluded himself

(1) (1909) 10 C.L.J., 263 at p. 269. (2) (1907) I.L.R., 30 Mad., 135.

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from maintaining a declaratory action by his conduct or by omission to sue within the statutory period, a remote reversioner is entitled to maintain the suit." In *Sambasiva Aiyar* v. *Seethalakshmi Ammal*(1), it has been held by this Court that a reversioner paying arrears of Government revenue in order to save the estate from sale is entitled to recover the same from the widow in possession. I am of opinion that the daughters had sufficient interest in the land to entitle them to discharge Muthu Goundan's debt when the property was brought to sale and that by doing so they obtained a charge over the land which they were entitled to assign or charge in favour of the plaintiff. I must therefore hold that the plaintiff obtained a valid charge for the amount paid by him to discharge Muthu Goundan's mortgage The widows cannot contend that they have been put to any disadvantage by the redemption of Muthu Goundan's mortgage by the daughters The amount due to the plaintiff was disputed by the first defendant in her written statement. The case does not appear to have been tried on the merits. We therefore reverse the decrees of the Courts below and remand the suit to the Court of first instance for disposal on the merits The costs up to date will abide the result.

SPENCER, J.

SPENCER, J.—I agree with my learned brother in thinking that the defendants Nos. 3 to 7 as reversioners were persons interested within the meaning of section 69 of the Indian Contract Act in the payment of money which the widows, the defendants Nos 1 and 2, were bound to pay to Muthu Goundan. By discharging the debt for which the property of the defendants Nos. 1 and 2 was on the point of being sold, I think that they were equitably entitled to have a charge on the property. This being so, I am further of opinion that the assignment or sub-mortgage by the defendants Nos 3 to 7 to the plaintiff of their lien by the deed of July 3rd, 1909, was in law a valid transaction The result will be as above stated.

(1) Civil Revision Petitions Nos 343 and 344 of 1908.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran Nair.

1910. October 18.

SINGARAM PILLAI AND SEVEN OTHERS (RESPONDENTS) APPELLANTS,

v.

HAZARATH KIBULAI SYED GULAM GOUSE SHA SAHIB KADIRI (PETITIONER IN ALL), RESPONDENT IN ALL. *

Limitation Act (IX of 1908), sch. II, art 110 — Madras Rent Recovery Act (VIII of 1865) ss. 9 and 10—When rent ascertained and payable.

Rent is payable, within the meaning of article 110 of schedule II of the Limitation Act only when it is ascertained.

When proceedings are taken by the landlord under section 9 of the Madras Rent Recovery Act after the end of the fasli to enforce acceptance of a patta tendered within the fasli, the landlord has to await an adjudication under section 10 of the Act and limitation begins to run in respect of a suit for rent only from the date of such adjudication, as it was only then that it can be said that the rent for the suit fasli was ascertained.

Rangayya Appa Rao v. *Bobba Sriramalu* [(1904) I L R. 27 Mad., 143 (P.C.)], followed.

APPEALS under section 15 of the Letters Patent Act (24 and 25 Vict., Cap. 104) against the judgment of the Honourable the CHIEF JUSTICE in *Syed Gulam Ghouse Shah Sahib* v. *Shunmugam Pillai*(1) dated the 1st day of February 1910, presented against the decree of K. S. LAKSHMINARASA AYYAR, the District Munsif of Valangiman in Small Cause Suits Nos. 620 to 624 and 626 of 1907, respectively.

The facts of this case are stated in the judgment of the Honourable the CHIEF JUSTICE in *Syed Gulam Ghouse Shah Sahib* v. *Shunmugam Pillai*(1).

Letters Patent Appeal No. 12 of 1910.

The Honourable *Mr. P. S. Sivaswami Ayyar*, the Advocate-General, *K. Ramachandra Ayyar* and *S. Muthia Mudaliar* for the appellants.

S. Srinivasa Ayyar for the respondents in all the appeals.

Letters Patent Appeals Nos. 13 to 17 of 1910.

S. Muthia Mudaliyar for the appellants.

MUNRO AND SANKARAN NAIR, JJ.

JUDGMENT.—We think the conclusion the learned CHIEF JUSTICE has arrived at is correct. Pattah for the suit fasli was tendered before the judgment of the High Court—Exhibit C—

* Letters Patent Appeals Nos. 12 to 17 of 1910.

(1) (1911) I.L.R., 34 Mad., 438.

was pronounced. As the pattah tendered was not in accordance with the judgment of the High Court the plaintiff could not successfully maintain a suit for rent upon it and he could not tender a fresh pattah as the fasli had by then expired. His only course in this case was to sue under section 9 of Act VIII of 1865 to enforce acceptance of the pattah tendered. This he did and he had to await an adjudication under section 10 of the Act and we think that limitation runs from the date of that adjudication, as it was only then that it can be said that the rent for the suit fasli was ascertained: *Rangayya Appa Rao* v. *Bobba Sriramulu*(1). We express no opinion as to the effect of the High Court's judgment in the case of faslis subsequent thereto.

The appeals are dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, the Chief Justice, Mr. Justice Krishnaswami Ayyar and Mr. Justice Ayling.

G. KANAKAYYA (DEFENDANT), APPELLANT,

v.

JANARDHANA PADHI AND TWO OTHERS (PLAINTIFFS) RESPONDENTS.*

1910. August, 18 and 25, Sept 30, October 20, and November 14.

Estates Land Act (Madras Act I of 1908), sec 3, cl (7) and sec 6, cl (1)—"final decree" in sec 3, cl (7), meaning of

Held, by the Full Bench as follows—where an appeal from a decree in ejectment passed under the old law is heard after the commencement of Madras Act I of 1908 (Estates Land Act) the defendant being a ryot in possession of ryot land on such date, he is entitled to claim a right of occupancy under section 6, clause 1 of the Act notwithstanding the original decree

The words "final decree" in the last sub-clause of section 3, clause 7 mean a decree which is not under appeal or liable to be set aside or modified on appeal

Obiter, CHIEF JUSTICE —It is clear that where a landlord obtains a decree in ejectment before the commencement of the Act and executes it before the commencement of the Act the ryot could not claim the benefit of the first part of section 6

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(1) (1904) I.L.R., 27 Mad., 143 (P.C.)

* Second Appeal No 539 of 1909

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Obiter, KRISHNASWAMI AYYAR, J.—The final decree of a competent civil court referred to in the definition of "old waste" in section 3, clause 7 is a decree obtained in a proceeding independent of that in which the question of occupancy right is dealt with under section 6, clause (1) or the presumption under section 23 is made

The presumption under section 23 applies to all suits or appeals whether pending at the date of the commencement of the Act or instituted thereafter.

SECOND APPEAL against the decree of E. L. VAUGHAN, the District Judge of Ganjam, in Appeal No. 317 of 1908, presented against the decree of B. VENKATESAVARA RAO, the District Munsif of Sompeta in Original Suit No. 103 of 1901.

This Second Appeal came on for hearing before their Lordships MILLER and KRISHNASWAMI AYYAR, JJ. and the case having stood over for consideration, the Court made the following *Order*.

MILLER AND KRISHNA-SWAMI AYYAR, JJ.

ORDER OF REFERENCE TO THE FULL BENCH.—The plaintiffs are the proprietors of an estate which falls within the definition of that term in the Estates Land Act. They seek to eject the defendant on the ground that he is only a yearly tenant and that a proper notice to quit has been served upon him. The defendant claims permanent rights of occupancy. The District Munsif passed a decree for ejectment on the 25th April 1908. The defendant appealed to the District Court on the 20th July 1908 contending that the District Munsif should have held that he *had permanent* rights of occupancy. The District Judge agreed with the District Munsif and confirmed his decree on the 23rd of October 1908. The defendant has preferred this Second Appeal. It is argued on his behalf that he had occupancy rights under section 6 of the Estates Land Act which came into force on the 1st July 1908. Section 6 declares "that every ryot now in possession . . . of ryoti land not being old waste . . . , shall have a permanent right of occupancy." Obviously the word "now" refers to the date of the commencement of the Act. The section speaks of "every ryot now in possession" and the word "now" is used in juxta-position with the word "hereafter" in the clause "or who shall hereafter be admitted by a landholder into possession" *The second part of the first clause of the section* saves rights of permanent occupancy acquired in old waste before the commencement of the Act. If there could be any doubt as to the meaning of the word "now" that has been removed by the explanation added by the amending Act IV of 1909 to

sub-section 1. It says the "expression 'every ryot now in possession' shall include every person who continues in possession at the commencement of this Act." It seems impossible to resist the conclusion that it was the deliberate intention of the legislature to confer a right of occupancy upon a ryot in possession at the date of the commencement of the Act. Such an interpretation may have the effect of nullifying vested rights under contracts previously entered into. But it is impossible to refuse to place the interpretation that ryots in possession of land at the date of the commencenment of the Act are entitled to occupancy rights on the mere general principle that a legislative enactment should not be interpreted so as to affect vested rights or to give it retrospective operation by applying it to pending suits. As pointed out by BOWEN, L J, "no doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the legislature is obscure, it does not modify the clear words of a statute"—*Quilter* v. *Mapleson*(1). In *In Re Williams and Stepney*(2), it was held by the Court of Appeal that a submission prior to the Arbitration Act included a provision in the schedule to the Act "that the costs of the submission were in the discretion of the arbitrators or umpire" though the arbitration alone commenced after the commencement of the Act. They gave effect to the plain intention of Parliament that a submission before the Arbitration Act came into force was subject to the provisions of the Act. The institution of the suit in this case before the Estates Land Act came into force cannot affect the applicability of section 6 if the defendant was in possession of the land at the date of the commencement of the Act. The contention that the possession of the defendant ceases in law by a decree for possession against him is a confounding of possession with title and is not worthy of serious notice. But it is argued that section 6 has no application because the plaintiffs had obtained a decree for ejectment from the District Munsif and the Appellate Court had no power to set aside the District Munsif's judgment unless the District Munsif was in error in passing his judgment under the law as it stood at the time Our attention has been called to the decisions of the Privy Council in *Ponnamma* v. *Arumogam*(3) and of the Court of Appeal in *Eyre* v. *Wynn-Mackenzie*(4). In

(1) (1882) 9 Q B D., 672 at p 677.
(2) (1891) 2 Q B, 257
(3) (1905) L R, A.C. 383
(4) (1896) 1 Ch., 135.

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the first of these cases the Supreme Court of Ceylon had refused a decree for partition of an intestate's estate. The Privy Council was invited to set aside that decree on the ground that the ordinance which precluded the maintenance of a suit without letters of administration to the estate of the deceased had been modified by the new Code of Civil Procedure passed since the decision of the Supreme Court. Without considering the question whether the provision of the new Code was retrospective, their Lordships declined to accede to the prayer of the appellant on the ground that the judgment of the Supreme Court was right when it was given; see *Ponnamma* v. *Arumogam*(1). Their Lordships further added that it was not the practice of the Judicial Committee to entertain any other appeal than one strictly so called in which the question was whether the order of the court from which the appeal was brought was right on the materials which that court had brought before it. The decision of the Privy Council is no authority for the broad proposition that if a right decision is pronounced in accordance with the law as it stood at the date of the decision it is not competent to the Appellate Court under the law as subsequently modified, to which retrospective effect is expressly given, to modify the decision of the Original Court in accordance with the change in the law. If the Appellate Court is a mere Court of error whose functions are limited to correcting the error committed by the Original Court, a change in the law subsequent to the passing of the Original Court's decision cannot entitle the Appellate Court to interfere with the original decision. But nothing has been pointed out to us to lead us to that conclusion. Order XLI, rule 33 entitles the Appellate Court, and Order XLII read with that rule entitles this Court in Second Appeal, to pass such further or other order as the Court thinks fit. Even before the passing of the new Code of Civil Procedure it was not the theory under the old Code that the Appellate Court had only the limited authority to rectify any errors that might be pointed out in the original decision—See sections 565 to 569. The Appellate Court confirmed the original decree, or it varied or reversed it—section 577. In suits for partition, the birth or death of a member subsequent to the decree of the Original Court for partition has been held to entitle the Appellate Court to pass

(1) (1905) L R A.C., 383 at p 388.

the appropriate decree for partition with reference to the added or reduced claimants for partition. See *Sakharam Mahadev* v. *Hari Krishna*(1). In *Rustomji* v. *Sheth Purshotamadas*(2), it was held by JENKINS, C J. and CHANDRAVARKAR, J., that it was open to a Court of Appeal to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed. See also the learned judgment of MOOKERJEE, J., in *Ram Ratan Sahu* v. *Mohant Sahu*(3). The remarks in *Ramanadan Chetti* v. *Pulikutti Servai*(4) and in *Subbaraya Mudali* v. *Manika Mudali*(5) merely refer to the ordinary practice of the Appellate Court and do not affect the power to proceed on grounds not available at the time of the original decision There is no warrant therefore for supposing that the Appellate Courts in India are confined to the determination of the correctness of the original decision in accordance with the law as it stood at the date of that decision. See the observations of Sir V. BASHYAM AYYANGAR, J., in *Kristnama Chariar* v *Mangammal*(6). As to the decision in *Eyre* v *Wynn-Mackenzie*(7) it is sufficient to remark that the time for appeal from the original judgment had expired at the date of the coming into force of the new law and the Court of Appeal declined to extend the time for appeal to enable the appellant to take advantage of the change in the law. This case has therefore no application to the question under consideration On the other hand the decision in *Quilter* v. *Mapleson*(8) appears to support the view we have taken. There the change in the law was subsequent to the decision of the Queen's Bench Division The language of the new law was clearly retrospective. It is true that the Court of Appeal there said that appeals to the Court of Appeal under the Chancery practice were in the nature of a rehearing and this circumstance is adverted to by Lord DAVEY in the judgment of the Judicial Committee in *Ponnamma* v. *Arumogam*(9). But it is equally clear that both the MASTER OF THE ROLLS and BOWEN, L.J., relied on the language of Order 58, rule 5, which empowers the Court of Appeal to pass such further or other order as the case may require—language which exactly

(1) (1882) I L R, 6 Bom, 113 (2) (1901) I L R, 25 Bom, 606
(3) (1907) 6 C L J, 74 (4) (1898) I L R, 21 Mad, 288 at p 290.
(5) (1896) I L R, 19 Mad, 345 at p 347
(6) (1903) I L R, 26 Mad, 91 (F B) (7) (1896) L R, 1 Ch, 135
(8) (1882) L R., 9 Q B D, 672 (9) (1905) L R, A C, 383

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corresponds to the words of Order 41, rule 33 of the Code of 1908. We must therefore disallow the objection based on the ground that the authority of the Appellate Court is limited to the determination of the question whether the Original Court was right according to the law in force at the time of its judgment. That section 6 was applicable to appeals pending when Madras Act I of 1908 came into force was the view taken in *Govinda Parama Guruvu* v. *Dandasi Pradhanu*(1), and *Venkata Gopalarayanim Garu* v. *Venkata Subbayya*(2) by two other Benches of this Court and we see no reason to depart from the view to which one of us was a party.

Mr. Ramesam next contends that in Second Appeals this Court is limited to the grounds mentioned in section 100 of the Code and that we have no power to interfere unless we can hold that the decision of the District Judge was contrary to law. Whatever difficulty there may arise in case the change in the law came into operation after the preferring of the Second Appeal, there is none in this case as the Estates Land Act came into force before the appeal was preferred to the District Court and the defendant claimed to be entitled to occupancy rights. The fact that section 6 of the Estates Land Act was not referred to specifically in the grounds of appeal to the lower Appellate Court (see however Order XLI, rule 2) does not prevent the decision of the District Judge being contrary to law within the meaning of section 100.

There is a further contention however which remains to be noticed. Treating section 6 as applicable, Mr. Ramesam argues on the authority of the decision of the learned CHIEF JUSTICE and ABDUR RAHIM, J. in *Raja of Venkatagiri* v. *Narasayya*(3) that the land in suit is old waste within the definition of that term in section 3, clause 7, and is therefore within the exception in clause 1 of section 6. He is no doubt fully supported by that decision. But we entertain doubts as to its correctness. Mr. Ramesam drew our attention to some English cases where the phrase "final judgment" has been explained—*Standard Discount Company* v. *La Grange*(4) and *Bozson* v. *Altrincham Urban Council*(5). It is enough to point out with reference to them

(1) (1910) 20 M.L.J., 528.
(2) Second Appeal No. 1592 of 1907.
(3) (1910) M.W.N., 369.
(4) (1877) 3 C.P.D., 67 at p. 71.
(5) (1903) 1 K.B., 547.

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that the phrase "final judgment" is there understood as in contra-distinction to the phrase "interlocutory judgment." Whenever the expression "final judgment" is used in connection with an appeal from one tribunal to another there can be no doubt whatever that it must be understood as used in contradistinction to the interlocutory judgment of a particular Court. In *Marchioness of Huntly* v. *Gaskell*(1), however, COZENS-HARDY, L.J., speaks of a judgment of the Court of Session under appeal to the House of Lords, as a final judgment having the force of *res judicata* in a proceeding in the English Court. See also *Doe* v. *Wright*(2) and *Burnaby* v *Earle*(3). Such a judgment would however not be final for the purpose of *res judicata* under the Code of Civil Procedure. [See HOLLOWAY, J., in *S. R. K. Suriyanarayanarazu* v. *C. Chellamma*(4), for the view of continental jurists]. It is true that the explanation of the word "final" attached to section 13 of the Code of 1882 has no application to section 3 of the Estates Land Act The omission in section 11 of the new Code of explanation IV to section 13 of the old Code cannot affect the meaning of the phrase "finally decided" in that section [see Woodroffe and Amir Ali's commentary on Act V of 1908, page 138] and is only an argument in favour of the view that that phrase by itself may mean "decided with conclusive effect" without reference merely to a particular tribunal. The framers of the Estates Land Act, which received the assent of His Excellency the Governor on the 25th March 1908, would probably have had in mind, when they used the words "final decree" in section 3, clause 7, the phrase "finally decided" in section 11 of the Code of Civil Procedure, which was passed on the 21st March 1908. Section 3, clause 7, speaks of a "final decree of a competent Civil Court" establishing that the ryot has no occupancy right and not of a final judgment. There is no such thing known to the Code of Civil Procedure as a preliminary or interlocutory decree in a suit in ejectment establishing that the ryot has no occupancy right. The word "final" could not have been inserted before the word "decree" in contradistinction to such a preliminary or interlocutory decree. The Estates Land Act which must have been passed with reference to the forms of decrees in force in the country could not appropriately speak of preliminary or

(1) (1905) 2 Ch., 656
(2) (1839) 50 R R., 634 [10 A & E 763, S C, 2 P & D, 672]
(3) (1874) L.R., 9 Q B., 490 at p. 492. (4) (1870) 5 M H C R., 176

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interlocutory decrees establishing that the ryot has no occupancy right. The reference to final decree in that clause cannot be treated as the final decree of a particular Court in contradistinction to an interlocutory or preliminary decree. It is difficult also to suppose that rights established under the final decree of one Court were intended to be protected when the matter becomes at large as soon as an Appeal is lodged [see *Nilvaru v. Nilvaru*(1), *Bhòlábhái v. Adesang*(2) and *Balkishan v. Kishan Lal*(3)] or that the establishment by one Court that the ryot has no occupancy right should bring the land within the definition of "old waste" even though the appellate court might in its turn have arrived at the opposite conclusion that the ryot had occupancy rights, under the law in force prior to the commencement of the Act. Section 177 speaks of the final order or decision fixing the rent. There can be no doubt that the order or decision there referred to is not that of any particular Court but a determination which has become conclusive because it has not been appealed against or has been pronounced in appeal with no further possibility of interference. As we entertain doubts about the correctness of the ruling in *Raja of Venkatagiri v. Narasayya*(4) as to the meaning of the phrase "final decree of a competent Civil Court" in clause 7 of section 3 of the Estates Land Act we refer the following question to the Full Bench:—

"Where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant being a ryot in possession of ryoti land on such date, is he entitled to claim a right of occupancy under section 6, clause 1 of the Act notwithstanding the original decree?"

K. Parthasarathy Ayyangar and *T. Rangachariar* for the appellant.

'The question is "what is the meaning of 'final decree' in section 3, clause (7) of the Estates Land Act, 1908.?"

In the Act the word "final" is frequently used with regard to orders under the Act. Section 75, clause (7) states that the Collector's order under that clause shall be final and have the effect of a decree. Section 142 lays down that in cases where an appeal lies under Chapter VII, the decision of the Board of

(1) (1882) I.L.R., 6 Bom., 110 at p. 112. (2) (1885) I.L.R., 9 Bom., 75 at p. 81.
(3) (1889) I.L.R., 11 All., 148 at p. 161. (4) (1910) M.W.N., 369.

Revenue shall be final. Section 177 refers to a "final" order. Section 199, clause (3) also uses the word "final." If the expressions "decree" and "final decree" have the same value the word "final" is mere surplusage. I maintain that no decree is final until all remedies are exhausted in appeal and no decree which can be appealed against is a final decree. Under the Criminal Procedure Code 1908 no decree of a Lower Court is final (*Vide* Section 11). *Vide* also *Sheosagar Singh* v. *Sitaram Singh*(1), *S R. K. Suryanarayanarazu* v. *C. Chellamma*(2) and *Gunga Bishen Bhugut* v. *Roghoonath Ojha*(3).

[KRISHNASWAMI AYYAR, J.—It may be contended that the fact that there is an appeal does not make it any the less a final decision. The idea may be that the appellate judgment takes the place of the original judgment.]

Chunder Coomar Mitter v. *Sib Sundari Dassee*(4) is authority for the proposition, that final decree means conclusive decree Also *Jones* v. *Reynolds*(5)

[CHIEF JUSTICE.—A final decree may be final without being conclusive. The words "final decree of a competent Civil Court" seem to refer to Courts of First Instance They could not refer to the Privy Council.]

[KRISHNASWAMI AYYAR, J.—I think "competent" refers to the Court's jurisdiction, *e.g.*, the Privy Council will not have jurisdiction unless the Original Court had it.]

The word "final" is not used in contradistinction to "interlocutory". In *Arunachellathudayan* v *Veludayan*(6), HOLLOWAY, J. discusses the words "final decree" He says "a decree is not in any correct sense of the word 'final' until all the legal means by which it can be impeached have been exhausted." *Niliaru* v. *Niliaru*(7), *Raja of Venkatagiri* v *Narasayya*(8), *Balkishan* v. *Kishan Lal*(9), *Pichuiayyangar* v *Seshayyangar*(10) and *Munisami Naidu* v. *Munisami Reddi* (11), referred to

V. Ramesam.—contra.

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(1) (1897) I L R, 24 Calc, 616 at pp 626 and 627 (P C)
(2) (1870) 5 M H C R, 176 (3) (1881) I L R, 7 Calc, 381
(4) (1882) I L R, 8 Calc, 631 (5) (1834) 1 A & E, 384 (110 E R 1254)
(6) (1870) 5 M H C R, 215, at p 221 (7) (1882) I L R, 6 Bom, 110
(8) (1910) M W N, 369
(9) (1889) I L R, 11 All 148 at pp 160 and 161
(10) (1895) I L R, 18 Mad, 214 (F B) (11) (1899) I L R, 22 Mad, 293

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interlocutory decrees establishing that the ryot has no occupancy right. The reference to final decree in that clause cannot be treated as the final decree of a particular Court in contradistinction to an interlocutory or preliminary decree. It is difficult also to suppose that rights established under the final decree of one Court were intended to be protected when the matter becomes at large as soon as an Appeal is lodged [see *Nilvaru* v. *Nilvaru*(1), *Bhòlábhái* v. *Adesang*(2) and *Balkishan* v. *Kishan Lal*(3)] or that the establishment by one Court that the ryot has no occupancy right should bring the land within the definition of "old waste" even though the appellate court might in its turn have arrived at the opposite conclusion that the ryot had occupancy rights, under the law in force prior to the commencement of the Act. Section 177 speaks of the final order or decision fixing the rent. There can be no doubt that the order or decision there referred to is not that of any particular Court but a determination which has become conclusive because it has not been appealed against or has been pronounced in appeal with no further possibility of interference. As we entertain doubts about the correctness of the ruling in *Raja of Venkatagiri* v. *Narasayya*(4) as to the meaning of the phrase "final decree of a competent Civil Court" in clause 7 of section 3 of the Estates Land Act we refer the following question to the Full Bench :—

"Where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant being a ryot in possession of ryoti land on such date, is he entitled to claim a right of occupancy under section 6, clause 1 of the Act notwithstanding the original decree ?"

K. Parthasarathy Ayyangar and *T. Rangachariar* for the appellant.

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In the Act the word "final" is frequently used with regard to orders under the Act. Section 75, clause (7) states that the Collector's order under that clause shall be final and have the effect of a decree. Section 142 lays down that in cases where an appeal lies under Chapter VII, the decision of the Board of

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meaning of the word "final"; also to *Nouvion* v. *Freeman*(1) and *Scott* v. *Pilkington*(2).

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A. Krishnaswami Ayyar for the first respondent.

This Reference coming on for hearing, the Court delivered the following Opinion:—

WHITE, C.J.

THE CHIEF JUSTICE.—The question which has been referred to us is "where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant being a ryot in possession of ryoti land on such date, is he entitled to claim a right of occupancy under section 6, clause I of the Act notwithstanding the original decree?" The question really resolves itself into a very narrow one—the meaning of "final decree" in section 3 (7) of the Act. It is of course perfectly clear that the word "now" in section 6 (1) refers to the date of the commencement of the Act. Under section 6 (1) a ryot who, at the date of the commencement of the Act, is in possession of ryoti land which is not old waste has a permanent right of occupancy. "Old waste" is defined in section 3 (7). By the last paragraph of this sub-section a technical meaning is given to "old waste" as including ryoti land in respect of which before the passing of the Act the landholder had obtained a final decree of a competent Civil Court establishing that the ryot had no occupancy right There seems no particular reason why land in respect of which such a decree had been obtained should be called "old waste," but the provision was probably introduced in the definition section in this way for convenience of drafting. One thing is clear and that is that the legislature intended to extend the class of lands which fell within the definition of "old waste," and by so doing to extend the class of lands which were excluded from the operation of section 6, in the interest of the landholder. The question raised in the order of reference came before ABDUR RAHIM, J., and myself in *Raja of Venkatagiri* v. *Narasayya*(3), and we took the view that the word "final" in section 3 (7) meant final with reference to the Court which pronounced the decree, and that a decree was none the less final for the purposes of the section because an appeal was pending when the Act came into operation. It seemed to us unreasonable to hold, unless we were

(1) (1890) 15 A.C 1 at p 10 (2) (1862) 2 B & S, 11 at p 41
(3) (1910) M W.N., 369.

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constrained to do so by the language used by the legislature, that the effect of a decree in the land owner's favour was overridden by the Act unless the decree was that of the Court of final appeal, or unless, where the decree was not that of the Court of final appeal, the time for appealing from the decree had expired at the date of the commencement of the Act. It is clear that where a landlord obtains a decree in ejectment before the commencement of the Act and executes it before the commencement of the Act, the ryot could not claim the benefit of the first part of section 6. And it seems anomalous that a question of title might turn on the more or less accidental circumstance of execution or non-execution of a decree in ejectment. But the intention of the legislature must of course be gathered from the language used by the legislature. Some meaning must be attached to the word "final" in section 3 (7) and there is no doubt much force in the argument that in a suit for ejectment final decree of a Court does not mean final as distinguished from a preliminary or interlocutory decree of that Court in the sense in which these decrees are provided for in the Code of Civil Procedure.

I do not think we should be warranted in treating the word as surplusage and if it does not mean final as distinguished from preliminary or interlocutory as regards the Court which pronounced the decree, it is difficult to resist the argument that it means final in the sense that it cannot be appealed against. My learned brethren are of opinion that the word "final" should be so construed. I confess to considerable doubt upon the point, but, after hearing the matter fully argued, I do not propose to dissent from this view. I would therefore answer the question which has been referred to us in the affirmative.

KRISHNASWAMI AYYAR, J.

KRISHNASWAMI AYYAR, J.—I have carefully reconsidered the question referred to the Full Bench in the light of the further arguments addressed to us by the learned pleader for the respondents I have been strengthened in the conclusion indicated in the order of reference. I have no desire to repeat the arguments stated in the last paragraph of that order. The question is what is a "final decree of a competent Civil Court establishing that the ryot has no occupancy right." Does it include a decree which is under appeal? I attach no importance to the indefinite article "a" before "competent Civil Court" any more than in the phrase "a Court of competent jurisdiction"

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"any." It would have been quite out of place to use the definite article "the" instead. I think that "a final decree establishing that the ryot has no occupancy right" is a decree that is not under appeal or liable to be set aside on appeal. It seems to me to be altogether incongruous to convert ryoti land into old waste by reason of the adjudication of one Civil Court and to retain it in the same category although that adjudication may be set aside on appeal. It was pointed out that the last clause of sub-section 1 of section 6 saves a permanent right of occupancy that may have been acquired in old waste. Ryoti land which is old waste only by reason of the adjudication of no occupancy right by one Court must continue to be old waste though the very adjudication which brought it within that category is upset on appeal. I cannot think that such a result which necessarily flows from the contention of the respondent could have been intended by the legislature. It was conceded for the respondents that, if at the commencement of the Act there was an appellate decree declaring occupancy rights in reversal of an original decree against them, the landlord could not be said to have obtained a final decree negativing occupancy rights. It is difficult to reconcile this with the interpretation of "a final decree" as the last decree of any one Court. Again section 23 of the Act lays down that "when in any suit or proceeding it becomes necessary to determine whether any land is old waste or ryoti land other than old waste it shall be presumed to be ryoti land other than old waste until the contrary is proved" Now this presumption applies to all suits or appeals whether pending at the date of the commencement of the Act or instituted thereafter. Although a decree may have been passed by a Civil Court establishing that the ryot has no occupancy right the appellate Court will under this section be bound to presume in favour of such a right until the contrary is proved. It seems to me to be somewhat inconsistent to relegate ryoti land to the head of old waste by reason of the adjudication of one Court that there is no occupancy right, and to presume in favour of occupancy in appeal despite the decision of the Original Court, for the fact of such a decision having been obtained cannot itself preclude the presumption I am inclined to think that the final decree of a competent Civil Court referred to in the definition of old waste is a decree obtained in a proceeding independent of that in which

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the question of occupancy right is dealt with under section 6, clause (1) or the presumption under section 23 is made.

Mr. Ramesam argued that the words "final order or decision fixing the rent" in section 177 were of no value *in interpreting* the phrase "final decree establishing that the ryot has no occupancy right" for according to him there was only one officer who had to make the final order or decision. This contention proceeds upon a misapprehension of the provisions of chapter XI of the Act. Under section 170 the preliminary record prepared under section 169 has to be submitted to the confirming authority for sanction. The settlement of the rents comes into force upon such confirmation. Then under section 171 an appeal lies to a superior revenue authority or other special officer determined by rule or empowered by the Local Government. Then section 172 provides for revision by the Board of Revenue. Section 173 permits a regular suit in the Civil Court, within a time limited, by an aggrieved person. Clause 5 of section 173 says "when a Civil Court has passed final orders or a decree, under this section, it shall notify the same to the Collector of the district." The final order or the decree under the section must certainly mean the decree passed on appeal in the suit in case an appeal has been preferred from the decree of the Original Court. Again section 175 which empowers a revenue officer to correct a *bonâ fide* mistake in an order or decision under section 168 or 169 requires him to stay his hand in case an appeal is pending against the order under sections 171, 173 or 179. The appeal under section 173 from the Revenue officer's order must certainly include an appeal from the decision of the Civil Court passed under that section. When we come next to section 177 which speaks of the final order or decision fixing the rent which is not to be enhanced for a period of twenty years except on certain grounds, it seems to me to be abundantly clear that the finality here contemplated is not as regards a particular officer or Court, but, where there has been an appeal or revision or suit, the decision of the authority of last resort. It seems to me that we should place a similar construction upon the phrase "final decree" in the definition of old waste in section 3, clause 7. I adhere to the other reasons set out in the order of reference which led MILLER, J., and myself to this conclusion. I am prepared to accept the exposition of the word "final" in the expression "final

decree" given by HOLLOWAY, J., in his very able judgment in *Arunachellathudayan* v. *Veludayan*(1). My answer to the question referred is in the affirmative.

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AYLING, J.—It appears to me that some meaning must be attached to the word "final" as qualifying "decree" in clause (7) of section 3 of the Madras Estates Land Act: and, that, in the connection in which it is used, it must be taken to indicate a decree which has ceased to be liable to be modified on appeal. I would answer the reference in the affirmative.

KRISHNASWAMI AYYAR, J. AYLING, J.

This Second Appeal coming on for final hearing on the 13th day of December 1910, after the expression of the opinion of the Full Bench, the Court consisting of KRISHNASWAMI AYYAR and AYLING, JJ., delivered the following:—

JUDGMENT.—In accordance with the ruling of the Full Bench, we set aside the decree of the Courts below, except as regards the amount of profits decreed and dismiss the suit with reference to the prayer for ejectment. We make no order as to costs.

KRISHNASWAMI AYYAR AND AYLING, JJ

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

Re N. JALADU AND ANOTHER (PRISONERS), APPELLANTS.*

1911. October. 16 and 24.

Indian Penal Code (Act XLV of 1860), sec. 90—'Consent' obtained on misrepresentation, illegal—Indian Penal Code (Act XLV of 1860), sec. 366—Kidnapping a girl with such consent obtained from guardian.

The offence of kidnapping consists in taking or enticing a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping.

A consent given on a misrepresentation of a fact is one given under a misconception of fact within the meaning of section 90, Indian Penal Code, and as such is not useful as a consent under the Penal Code. A misrepresentation as to intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a "fact" within the meaning of section 3 of the Evidence Act.

Per Curiam—Equally useless as a defence is a consent obtained by a fraud or coercion.

R. v. *Hopkins* (1842) Car & M. 254, followed

(1) (1870) 5 M H C.R , 215 at pp 221—223. * Criminal Appeal No. 353 of 1911

Re JALADU.

APPEAL against the order of E. H. WALLACE, the Acting Sessions Judge of the Nellore Division in Sessions Case No. 8 of the calendar for 1911.

In this case, the appellants were convicted under section 366, Indian Penal Code, of the offence of kidnapping a girl (prosecution witness No. 1) of about ten years of age from the guardianship of her mother prosecution witness No. 2) with intent that she might be compelled to marry against her will. The facts found by the Lower Court are that the second accused, a relation of prosecution witnesses Nos. 1 and 2, asked prosecution witness No. 2 and prosecution witness No. 3 her (prosecution witness No. 2's) grand-mother to send the girl for three days for *Bogikolusu* (or present gathering at a festival) but really with the intention of disposing of the girl in marriage to the first accused without the consent of the girl and prosecution witness No. 2 and prosecution witness No. 3, the great grand-mother, let her go. More than a week after the second accused had taken the girl to her village she led her to another village on a false pretext. She then took her to a temple there, where the first accused was waiting and there the girl was married to the first accused against her will.

The defence was that the girl was taken and married to the first accused with the consent of prosecution witness No 2 and prosecution witness No. 3. The Sessions Judge convicted both the accused under section 366, Indian Penal Code, holding the defence to be false Hence the appeal for appellants.

P. R. Grant for the Public Prosecutor.

SUNDARA AYYAR AND SPENCER, JJ.

JUDGMENT.—In this case the appellants have been convicted under section 366, Indian Penal Code of the offence of kidnapping a girl (prosecution witness No. 1) of about 10 years of age from the guardianship of her mother prosecution witness No. 2 with intent that she might be compelled to marry against her will. The facts found by the Lower Court are that the second accused a relation of prosecution witnesses Nos. 1 and 2, asked prosecution witness No 2 and prosecution witness No. 3, her (prosecution witness No 2's) grand-mother to send the girl for three days for *Bogikolusu* (or present gathering at a festival) but really with the intention of disposing of the girl in marriage to the first accused without the consent of the girl and prosecution witness No. 2 and prosecution witness No. 3. Prosecution witness No. 3, the girl's great grand-mother, let her go. More than a week after the second accused had taken the girl to her village she

led her to another village on a false pretext. She then took her to a temple there, where the first accused was waiting, and there the girl was married to the first accused against her will.

The *defence was that the girl was taken and married to the* first accused with the consent of prosecution witness No. 2, and prosecution witness No. 3.

We agree with the Lower Court in holding that the evidence adduced on behalf of the defence is not worthy of credit and that no consent was given by either prosecution witness No. 2 or prosecution witness No. 3 to the marriage. The Sessions Judge convicted both the accused under section 366, Indian Penal Code. He held that "if, as alleged by the prosecution, prosecution witness No. 2 allowed second accused to take her only for Bogikolusu, and second accused took her and got her married in violation of her legal guardian's authority the offence of kidnapping is complete." This statement of the law cannot be accepted as correct. The offence of kidnapping consists in taking or enticing a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping. So far as the first accused is concerned it was not alleged by the prosecution that he was a party to the taking away of the girl from the guardianship of prosecution witness No. 2 nor was it alleged that he took her away from the custody of the second accused. The District Judge finds that he "acted in concert with her and assisted in the kidnapping" We do not find any evidence that he instigated or aided her in the taking of prosecution witness No. 1 nor is there any charge or proof of conspiracy as regards this part of the transaction. There is no evidence that prior to the time of the marriage the girl had been removed by the first accused from the custody of the second accused, who took her from prosecution witnesses Nos. 2 and 3. The offence charged has not been made out against the first accused. His conviction cannot, therefore, be sustained.

It remains to be considered whether the second accused is guilty under section 366 or not Prosecution witness No. 2 said that she refused to consent to the second accused taking the girl and that she had gone away from the house when she actually took her, but prosecution witness No. 3 does not

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corroborate her in this statement; and the girl prosecution witness No. 1 clearly says that her mother prosecution witness No. 2 sent her. We are of opinion on the evidence that prosecution witness No. 2 also consented to the girl going with the second accused. But it appears that the second accused obtained the consent of the girl's guardian by falsely representing that the object of taking her was only to gather presents for a festival. The question is, whether in these circumstances it can be said that the guardian gave her consent to the taking of the girl within the meaning of section 361, Indian Penal Code. Section 90, Indian Penal Code provides "A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury or *under a misconception of fact*, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception" We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In section 3 of the Evidence Act illustration (*d*) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in *R.* v. *Hopkins*(1), that a consent obtained by fraud would not be sufficient to justify the taking of a minor See also Halsbury's Laws of England, volume 9, page 623. In Stephen's Digest of the Criminal Law of England (sixth edition, page 217), the learned author says with reference to the law relating to "Abduction of girls under sixteen" "thus . If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person." And he gives the following illustration No (5). "A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C." The illustration is founded on the case of *R.* v. *Hopkins*(1), already referred to. Although in cases of contracts a consent obtained by coercion or fraud is

(1) (1842) Car. and M., 254.

only voidable by the party affected by it, the effect of section 90, Indian Penal Code, is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence. The second accused must, therefore, be held to have removed the girl from the guardianship of prosecution witness No. 2 without her consent.

In the result, we confirm the conviction and sentence with respect to the second accused and reverse the conviction of the first accused and direct that he be set at liberty.

APPELLATE CRIMINAL.

Before Mr. Justice Benson.

1911. Oct 3, 4, 12 and Nov. 23

G. G. JEREMIAH (ACCUSED) APPELLANT,

v

F. S. VAS (COMPLAINANT), RESPONDENT.*

Evidence Act (I of 1872) ss. 21 and 81—Evidence of publication of a newspaper by a particular person, merely by production of the paper—Sufficiency of, Criminal Procedure Code (Act V of 1898), ss. 255, 256, 271, 272 and 428—'necessary' meaning of, in—Mistake of Court, as to primâ facie case—Retrial.

Per SUNDARA AYYAR and PHILLIPS, JJ.—

Merely exhibiting a copy of a private newspaper containing a libellous statement without any sort of proof such as the production of an authenticated copy of a declaration under section 7 of Act XXV of 1867 is no proof of publication of the libel by the person by whom the paper purports to have been published.

Evidence that a certain copy of the paper "*appears to be printed and published by A*" is no proof of publication, by him.

If there be proof of publication of a newspaper by *A* then section 81, Evidence Act, presumes that what purports to be a newspaper of a particular name is that paper and that every copy of it was issued by the publisher of that paper.

Gathercole v. *Miall* [(1846) 15 M. & W. 319], *Rex* v. *Forsyth*, [(1814) Russ. and R. 274] and *Watts* v. *Fraser*, [(1837) 7 Ad. & E. 223], considered.

A statement in a complaint that the accused published the libel is no evidence against the accused as it was not made in the presence of the accused. The fact that the accused never denied publication by him of the libel does not relieve the prosecution from the necessity of proving affirmatively that the accused published the libel, an essential fact necessary to establish the guilt of the accused.

Additional evidence under section 428, Criminal Procedure Code, can be ordered to be taken only if the appellate court thinks it necessary.

Quære.—Whether if the admission by the accused of publication is contained in his written statement, that would relieve the prosecution from the defect in letting in evidence of publication.

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* Criminal Appeal No. 194 of 1911

JEREMIAH v. VAS.

Difference between admissions in civil and criminal cases pointed out.

Quære.—Whether section 81 of the Evidence Act is not confined to public documents alone.

Per SUNDARA AYYAR, J.—Where the prosecution by its own negligence failed to produce evidence which it was its duty to do additional evidence cannot be considered '*necessary*' by the Appellate Court within the meaning of section 428. The language of that section seems to indicate cases where, there being already evidence on the record, the court considered it to be unsatisfactory or where the evidence on record leaves the court in such a state of doubt that it considers it necessary to enable it to decide the case, to have further evidence.

In such a case the accused should be ordered to be acquitted and not retried allowing further evidence to be taken.

Per PHILLIPS, J.—Where on the court itself taking a mistaken view that a *primâ facie* case of publication by the defendant had been made out (as was evident from its framing a charge) evidence to that effect was not let in by the complainant; it is a case where the Appellate Court ought to consider that additional evidence is *necessary* within the meaning of section 428, Criminal Procedure Code and a retrial would be the proper order to be made under the circumstances, if taking additional evidence would not meet the requirements of the case.

'Necessity' under section 428, Criminal Procedure Code, is a matter to be determined on the particular facts of each case.

Per BENSON, J.—Where the prosecution wanted to let in evidence necessary to prove the offence, but the Magistrate intervened, stating that it was *unnecessary* in the circumstances of the case and so refused to take that evidence, the case is one in which a retrial may properly be ordered or in which the Court may properly call for the additional evidence under section 428, Criminal Procedure Code

APPEAL against the judgment of F. J. RICHARDS, the District Magistrate and Justice of the Peace, Civil and Military Station, Bangalore, in Criminal case No. 20 J.P. of 1910.

The facts of this case appear fully in the judgment of SUNDARA AYYAR, J.

E. R. Osborne with *M. K. Narainaswami Ayyar* for the appellant.

The prosecution has failed to prove that appellant is the printer and publisher of the newspaper, without which a conviction cannot stand. See *Mohideen Abdul Kadir* v. *Emperor*(1), and *Emperor* v. *Chinnapayan*(2).

Gaps in the prosecution evidence should not now be allowed to be filled up: and the prosecution should not now be given an opportunity to prove that appellant is the printer and publisher. See *Basanta Kumar Ghattak* v. *Queen-Empress*(3).

(1) (1904) I.L.R., 27 Mad., 238. (2) (1906) I.L.R., 29 Mad., 372.
(3) (1899) I.L.R., 26 Calc., 49.

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There is no doubt, the statement of the accused, under section 272, Criminal Procedure Code, that he is the printer and the publisher but that is of no value. Because, all that an accused is required to say is, whether he is or is not guilty: and anything said in addition, should be left out of consideration. Moreover, there are no pleadings in criminal cases as in a civil case.

Again, the fact that a name corresponding to that of the appellant is printed at the bottom of the paper is no evidence of the appellant printing the paper. *Vide The King* v. *Williams and another*(1). In that case the name printed at the bottom of a playbill was held not to be evidence of who printed it.

Dr. Swaminathan for complainant.

Section 3 of Act XXV of 1867, requires the name of a printer to be inserted in a book or newspaper *Vide, Queen-Empress* v. *Hari Shenoy*(2)

The admission by the accused, in his statement, is conclusive The name at the bottom of the paper is *primâ facie* proof and the court is bound to presume its genuineness *Vide* section 81 of the Indian Evidence Act. "Genuineness" relates to the origin of the paper or book. *Vide* sections 79 and 80 of the Indian Evidence Act. If there is no evidence as to who the printer is, additional evidence ought to be permitted to be adduced under section 428.

E. R. Osborne in reply.

"Genuine" means that the paper is a "genuine copy" of the original and not that every bit of news in it is accurate. Such a presumption would be disastrous. Additional evidence is to be taken only if there is some evidence already on record, and the court is in doubt and seeks additional help. Where there is no evidence there can be no doubt whatever.

P. R. Grant for the Public Prosecutor was not called upon.

SUNDARA AYYAR J

SUNDARA AYYAR, J.—This is an appeal by the accused in Criminal Case No. 20 of 1910 in the Court of the District Magistrate and Justice of the Peace, Bangalore. He was convicted of libelling the complainant by publishing in a journal named the "Army and Civil News" on the 28th September 1910 what purported to be a report of the proceedings in a civil suit in the Court of the District Judge of Bangalore. The defendant in

(1) (1824) 2 L.J.(O.S.) K.B., 30 (2) (1893) I.L.R., 16 Mad., 443

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that suit was the uncle of the complainant, an Advocate of the Bangalore Court, who appeared for his uncle as counsel. The suit was for rent due by that defendant for a house. The report contained the following statement :—"His Honour facetiously remarked that the uncle, the Dental Surgeon, (that is, the defendant in the suit) and the lawyer nephew, both combined, wanted to deprive the plaintiff of his rent by shifting the responsibility on to the shoulders of the other nephew, the Dental Surgeon, who is now in Goa and beyond the reach of the arms of the civil law." Two days after the publication of this report a correction appeared stating that it was not "His Honour" that made the remark but Mr. Saldanha, the counsel for the plaintiff in the suit.

At the trial in the Lower Court the accused maintained that, notwithstanding the mistake mentioned above, the report was substantially correct and that it was a privileged statement made without malice. The Lower Court held on various grounds that the report was not substantially correct, and further found that it was extremely improbable that the remark was made at all by Mr. Saldanha and that there was evidence of malice in the tone of the report and of the correction notice.

On appeal the contention that the report was substantially a correct one was repeated; but I have no doubt that no privilege can be claimed for a mistake so palpable as the one that was admitted in this case and the publisher published the statement attributed to the Civil Judge at his own risk. The main contention in the appeal is that there is no legal evidence in the case that the accused published the libel complained of, and that the prosecution altogether failed to adduce evidence that the accused published the issue of the 28th September 1910 of the "Army and Civil News" in which the libel appeared or that he was the publisher of the journal known by that name. This contention I find to be well founded. A copy of the issue of the paper containing the libellous statement was put in. Besides this the only evidence of publication by the accused given after the accused appeared before the court was the statement by the complainant in examination-in-chief, "I have complained about the article marked Exhibit A in the 'Army and Civil News' which appears to be printed and published by Mr. G. G. Jeremiah." This does not amount to a definite statement either

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that the accused published the article in question or that he was the editor and publisher of the journal, whether the sentence, as contended by Mr. Osborne, means only that the particular issue of the journal put in bore the statement that it was printed and published by Mr. Jeremiah, or whether, as contended by Dr. Swaminathan, that the article or the journal appeared to the witness to be one printed and published by Jeremiah. In the petition of complaint put in by the complainant it is stated that the accused reported the case in the "Army and Civil News." The complaint was no doubt sworn to by Mr Vas, the complainant. But the statement was not made in the presence of the accused and could not be taken as evidence against him There is no explanation given why it was not repeated in the complainant's deposition at the trial. It is contended that the accused never denied that he was the printer and publisher of the "Army and Civil News", or that he published the issue of the 28th September 1910 containing the libellous statement, and that as a matter of fact he admitted the fact before the Lower Court in the written statement put in by him But I am unable to find any such admission in that statement Paragraph No. 3 thereof says "what was published was a substantially true report without any malicious intention." There is no admission here that it was the accused that published the statement It is in all probability true that the accused did not deny that he published the libel. This is not sufficient. It is incumbent on the prosecution affirmatively to prove that the defendant published the libel complained of, as that was one of the essential facts necessary to establish the guilt of the accused It is unnecessary to consider whether, if such admission were contained in the accused's written statement, that would relieve the prosecution from the defect in letting in evidence of publication *Mohideen Abdul Kadir* v. *Emperor*(1), *Emperor* v. *Chinnapayan*(2) and *Basanta Kumar Ghattak* v *Queen-Empress*(3), are authorities in support of the appellant's contention that such an admission by the accused made in answer to questions put by the court under section 342, Criminal Procedure Code, could not be utilized by the prosecution to fill up a gap in its own evidence No doubt

(1) (1904) I L R, 27 Mad, 238 (2) (1906) I L R, 29 Mad, 372
(3) (1899) I L R., 26 Calc 49.

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an admission by the accused may be proved in a criminal case just as much as an admission by the defendant in a civil suit under section 21 of the Evidence Act. But an admission under that section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence. It does not refer to pleadings in the case or to an admission contained in such pleadings. The accused in a criminal case may plead that he is guilty or not guilty. See sections 255, 256, 271 and 272, Criminal Procedure Code. But there are no pleadings in a criminal case similar to those in civil proceedings which are conclusive against the party making them. The prosecution has to prove all the facts necessary to constitute the offence charged against the accused. If it fails to do so, no charge could be framed at all against the accused in a warrant case, and in sessions cases the court should, when the case for the prosecution has been closed, acquit the accused where no evidence of any of the links necessary to establish the offence has been adduced by the prosecution. It is clear therefore that the appellant's omission in his written statement before the Lower Court to deny the publication, or any inference of his intention not to deny it, cannot be urged by the prosecution, in answer to the appellant's contention of no evidence of publication. It is contended that under section 81 of the Evidence Act, the Court is bound to presume the genuineness of every document purporting to be a newspaper or a journal, and that inasmuch as Exhibit A in the case bears the name of the accused as the printer and publisher, the presumption of its genuineness would include a presumption that the accused is the printer and publisher of Exhibit A, and that therefore it was unnecessary for the complainant to let in any evidence of the publication of Exhibit A by the accused. Mr. Osborne for the appellant contends that the section applies only to public documents, and that in any event it provides only that the court should presume that a document purporting to be a newspaper or journal is that it is the particular newspaper or journal, and not that it was printed or published by a particular person. His first contention appears to be supported by a note of Messrs. Ameer Ali and Woodroffe in their commentaries on the Evidence Act, fourth edition, page 425, that the section refers to public documents, but it is very doubtful whether the language of the section

supports it If punctuation may be taken to throw any light on the question, the existence of a comma after the word 'journal' is against the appellant's contention. Even otherwise, the natural import of the words of the section does not appear to favour the view that the phrase "printed by the Queen's printer" not only qualifies the expression "private Act of Parliament," but also "newspaper or journal." It is however unnecessary in this case to discuss the question further, as I am of opinion that the presumption of the genuineness of a newspaper does not include a presumption that it was printed and published by the person by whom it purports to be. Such apparently is not the English law. According to that law the proper way to prove the publication of a libel, where evidence is not given that a particular paper complained of was published by the accused, is to prove the statutory declaration made by the accused that he is the printer and publisher of the journal in question. In *Gathercole* v. *Miall*(1), the plaintiff sought to prove that the defendant published several copies of a newspaper called the "Nonconformist". That the defendant was the editor and publisher of the journal of that name appears to have been admitted. The plaintiff's object in proving the publication of many copies was to show the extent of damages sustained by him. A person of the name of Brookes was called, who stated that he was the president of literary association consisting of 80 members, that he saw at the institution office a copy of the issue in question, that he believed that the copy had been lost or destroyed, that he believed it to have been a copy of the paper produced in evidence and bore the same heading, namely, "Nonconformist" and that it contained the libellous article complained of. Objection was raised to the reception of secondary evidence of the contents of the paper that the witness had seen. PARKE, B., was of opinion that, as the defendant had been proved by the regular statutory evidence to be the printer and publisher of the paper, the witness's evidence that the copy he saw was similar to the one produced in court was sufficient to show that it was published by the defendant. The learned Judge observed: "There was general evidence that it was a paper called the Nonconformist, containing, according to the

(1) (1846) 15 M. & W., 319 at pp 327, 330 and 336-337.

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best of the witness's recollection, the libel, the subject of this action. I thought that was ample evidence to show that one of the copies of the newspaper, of which the defendant was the publisher, and of which, of course, he did not print one copy, but many, had been sent by some person, not the defendant, to that room." POLLOCK, C. B., observed "But then, it is said that this paper is not proved to have been issued by the defendant: that is a question entirely for the jury; and I think there is evidence to prove that this was one of the copies printed at the same time with the libel which is laid before the jury. It is not like the publication of a written libel. The jury must be aware that many copies of a newspaper are issued at the same time; and they are issued for the purpose of publication and distribution. No doubt a suggestion may be made, that the plaintiff, in order to enhance the damages, may have procured some papers to be printed. The jury are to consider whether that is a reasonable suggestion or not. There was some evidence for the jury to consider: and, I think the reasonable conclusion is, that this paper was originally issued by the defendant." ALDERSON, B., said: "Now we must consider what the nature of the instrument is. It is a copy of a newspaper. We must use our own common sense, and remember that, with respect to newspapers, not one copy, but a great variety of copies, are published for general circulation among the public at large. If you compare the instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials, and from the same type. . . . . So I say here with respect to a newspaper; if you find it in general corresponds, it is evidence from which the jury may infer that the newspaper is printed from the same type as the paper which is produced; and if so, it is printed by the defendant". It will be observed that in that case it was proved that the defendant was the publisher of the journal called the "Nonconformist." Proof was given that one copy of the issue in question produced before the court was in fact issued by the defendant. Some similarity between that copy and the copy seen by the witness (Mr. Brookes) was also proved by him. It was held that this was evidence sufficient to go to the jury that the copy seen by the witness was also published by the defendant. In my opinion the object of section 81 of the Evidence Act taking

it to refer to every newspaper is to dispense with evidence of two out of the three facts proved in that case provided the first fact is proved, viz., that the defendant is the publisher of the newspaper. The Court is then to presume that what purports to be a newspaper of a particular name is that paper, and that every copy of it was issued by the publisher of that paper. According to section 7 of Act XXV of 1867 the production of an authenticated copy of a declaration made under the Act is admissible to prove that the person mentioned in the declaration is the publisher of the journal to which the declaration relates. Section 81 would apparently authorise and require the court to presume that any document purporting to be a copy of the journal in question is in fact such and this would prove that the declarant under Act XXV of 1867 is the publisher of the paper produced in court. *Rex.* v. *Forsyth*(1), would seem to show that the presumption extends no further with regard to the *London Gazette,* which also is to be presumed to be genuine under section 81 of the Evidence Act. The reporters say "The Judges seem to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from". In an earlier case *Watts* v. *Fraser*(2), deposit of a copy of a newspaper at the stamp office as required by the statute is not sufficient evidence that others of that kind were circulated. This is not in accordance with the view taken in *Gathercole* v. *Miall*(3). In Wigmore on Evidence, volume III, section 2150, the learned author says with regard to the mode of proving the defendant's publication of a newspaper. "Here the process would be to bring home to him the issuance on that day of a certain copy (either by the testimony of one who bought at an office proved to be the defendant's or by some statutory method); then the identity between that copy and the one read by J.S. (the person to whom it is complained to have been communicated) will suffice as evidence that the two issued from the same press, *i.e.*, from the defendant's." Again the learned author says in section 2151. "The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be

(1) (1814) Russ & R., 274. (2) (1837) 7 Ad. & E., 223.
(3) (1846) 15 M & W., 319.

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published by the Government has led to a general concession, by judicial decision or by statute, that such purporting publications, at least when in the form of the standard official documents constantly issued and referred to, are to be assumed genuine. Two principles, however, are in fact usually involved: first, the admissibility of a copy, proved to be printed by official authority, as hearsay evidence of the contents of the original, and, secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated, either in decisions or in statutes." The author points out in a note that the distinction was recognized in *Rex.* v. *Forsyth*(1), already referred to. The question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to the proof of documents but to the admissibility of secondary evidence. The other sections contained in the chapter headed "presumption as to documents" seem to support the same conclusion. Section 87 provides in this case of certain books produced in evidence that "the Court may presume that they were written and published by the person and at the time and place by whom or at which it purports to be written or published." Section 90 provides specifically that where a document purporting or proved to be 30 years old is produced from proper custody the Court may presume the signature and every other part of such a document, which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed or attested. Section 81 does not expressly lay down that the Court is to presume that a document purporting to be a newspaper was printed and published by the person by whom it purports to be. Section 7· provides for a presumption not only that certain certificates or certified copies are genuine but also that the officer purporting to sign or certify held that character when he signed or certified. Section 80 also makes a distinction between the genuineness of a document that the truth of the statements as to the circumstances under which the record or memorandum to which that section relates was made. Section 7 of Act XXV of 1867 expressly provides the mode of

(1) (1814) Russ & R., 274

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proving that a particular person is the printer and publisher of a newspaper. On the whole it appears to be clear that the complainant cannot ask the Court to presume that the appellant is the printer and publisher of the "Army and Civil News." He could easily have proved the fact by producing a copy of the appellant's declaration made under Act XXV of 1867. He failed to do so. The result is that the appellant's contention that there is no legal evidence to prove the publication of the libel must be upheld, and the conviction of the appellant cannot be sustained.

Dr. Swaminadhan who appears for the complainant asks us to direct additional evidence to be taken under section 428, Criminal Procedure Code But in my opinion that section does not enable us to do so in this case It provides that "the Appellate Court if it thinks additional evidence to be necessary shall record its reasons and may either take such evidence itself or direct it to be taken, etc." It requires that the Appellate Court should consider additional evidence to be *necessary* The language seems to indicate cases where, there being already evidence on the record, the Court considers it to be unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. See *Woodoy Chand Mookhopadhya*(1) At any rate it does not appear to be applicable where the prosecution having had ample opportunities to produce evidence has failed to do so. No reason is given in this case why evidence of publication of the libel was not given. The prosecutor had no right to expect the accused to waive the proof of any fact, assuming that such waiver could be availed of by him Moreover the case is not one in which I can say the interests of public justice would justify the use of the provisions of section 428, Criminal Procedure Code. I must therefore decline to accede to Dr. Swaminadhan's request.

It remains to consider what is the proper order to pass in the case. It appears to me that this is not a proper case for directing a retrial. Section 423, Criminal Procedure Code, provides that in an appeal from a conviction the Court may "reverse the finding and sentence and acquit or discharge the accused or

(1) (1872) 18 W.R. (Cr R.), 31.

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(1) (1814) Russ & R., 274

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(1) (1872) 18 W.R. (Cr. R.), 31.

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order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial." An order for retrial would be proper where the trial was illegal, irregular or defective. I agree with the Calcutta High Court that the power to direct a retrial is not confined to cases where the trial was held by a Court having no jurisdiction. See *Kumudini Kanta Guha* v. *The Queen-Empress*(1) where it was held by PRINSEP and HANDLEY, JJ., that a retrial may be ordered where the trial is held to be illegal on the ground of misjoinder of charges. A retrial would be proper also where evidence is improperly rejected by the Lower Court or where, though the accused was rightly acquitted of one offence, the Appellate Court comes to the conclusion that he ought to have been tried for another offence. Such an order may also be made in every case of irregularity in the trial, such as where persons who ought not to have been tried together have been so tried. It would seem to be necessary that the Court should come to the conclusion that the trial was not held properly for some reason or other. It appears not to be enough that the prosecution by its own negligence failed to produce evidence which it was its duty to do. In a case similar to this the learned Chief Justice no doubt ordered a retrial, but the question whether he could do so does not appear to have been considered.

In the result I would acquit the accused and direct that the fine, if paid, be refunded.

PHILLIPS, J.

PHILLIPS, J.—I agree with my learned brother that for the reasons given by him the conviction should be set aside, but I do not agree that the appellant should be acquitted. If publication of the libel can be proved, and in this case there is not likely to be any difficulty in proving publication, the appellant is certainly guilty of defamation, and I do not think that in this case he should be allowed to escape the consequences of his misconduct, if he is really guilty. No doubt the prosecution could have adduced additional evidence and we see that a witness had been summoned to prove that the accused published the newspaper in question, but was not examined. For what reason he was not examined there is nothing on record to show; but it does appear that the District Magistrate thought that a

(1) (1901) I.L.R., 28 Calc., 104.

primâ facie case of publication had been made out against the accused, for he framed a charge on the evidence on record. Whether the District Magistrate acted on the complaint or on Exhibit A one cannot say, but he was satisfied that a *primâ facie* case of publication had been made out. We have found that in that view he was mistaken, and therefore seeing that the court itself was mistaken as to the sufficiency of the evidence on record I think that additional evidence is necessary in this case in order that the accused's guilt or innocence may be determined. Section 428 of the Criminal Procedure Code merely says that evidence may be taken when "necessary," and in each case the necessity must be determined on the particular facts of the case. The evidence is, I think, necessary in this case. I can find no case in which this court has held a view contrary to the one I now hold, and in a case very similar to the present the learned Chief Justice ordered a retrial [*Mohideen Abdul Kadir* v. *Emperor*(1)]. I would adopt the same course unless I thought the taking of additional evidence would be a more convenient mode of disposing of the case. I would therefore ask the District Magistrate to record additional evidence on the question of publication and certify it to this court.

SUNDARA AYYAR AND PHILLIPS, JJ.—As we do not agree as to the order that should be passed, the case must be laid before another Judge of this court.

This appeal again coming on for hearing the court upon perusing the grounds of appeal and the records of the lower court and the affidavit of B.W.S. Lawrence, counsel for the complainant, delivered the following order for further evidence from the lower court.

ORDER.—Since this case was referred to me for decision under section 429, Criminal Procedure Code, it has been made clear by the affidavit of the complainant's counsel in the Magistrate's Court and by the report of the Magistrate that the prosecution was prepared to adduce evidence of the publication of the libel, but that when counsel proceeded to adduce his evidence the Magistrate intervened and stated that it was unnecessary, the matter being already proved by the production of the newspaper, and that to adduce the evidence of the clerk to prove the declaration by the accused under Act XXV of 1867 would only be wasting the time of the court.

(1) (1904) I.L.R., 27 Mad., 238.

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In these circumstances I think the case is one in which a retrial may properly be ordered, or in which the court may properly call for evidence under section 428, Criminal Procedure Code, on the question in regard to which the Magistrate, in effect improperly refused to take the evidence which the prosecution attempted to adduce. The accused's counsel deprecates a new trial owing to the delay and expense involved, and, of the two courses, prefers that additional evidence should be called for. I also think this will be the most convenient course. I will therefore direct the Magistrate to take such further evidence in regard to the alleged publication of the libel as either party may adduce and certify the same to this Court as soon as conveniently may be.

This case again came on for hearing and upon perusing the grounds of appeal and the record of the evidence and proceedings before the Lower Court, the court delivered the following:—

BENSON, J. JUDGMENT.—The additional evidence now recorded proves that the accused did publish the libel complained of. He is therefore clearly guilty of the offence charged. Looking to all the circumstances of the case as set forth in the Magistrate's judgment, I do not think the sentence of fine of Rs 300 is excessive. I dismiss the appeal.

APPELLATE CRIMINAL.

Before Mr Justice Sundara Ayyar and Mr. Justice Spencer.

1911 November 23.

Re N. PONNUSAMY NADAN AND FIFTEEN OTHERS (ACCUSED IN CALENDAR CASE NO. 180 OF 1911 ON THE FILE OF THE SECOND CLASS STATIONARY SUB-MAGISTRATE OF KOILPATTI).*

Criminal Procedure Code (Act V of 1898), sec. 349,—'shall pass such order as he thinks fit', meaning of.

The words 'such order as he thinks fit' in section 349, *Criminal Procedure Code*, do not empower the Superior Magistrate to send the case back to the Sub-Magistrate for disposal but only empower him to pass such final order disposing of the case as he may think fit.

CASE referred for the orders of the High Court, under section 438 of Code of Criminal Procedure (Act V of 1898), by H. F. W. GILLMAN, the District Magistrate of Tinnevelly, in his letter, dated 14th September 1911.

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* Criminal Revision Case No. 557 of 1911 (and Referred Case No. 107 of 1911).

The facts of this case appear from the following Order:— *Re* PONNUSAMY NADAN

Joseph Satya Nadar for the accused.

P. R. Grant for the Public Prosecutor.

ORDER.—We agree with the District Magistrate's view that the Sub-Divisional Magistrate to whom the case was referred by the Sub-Magistrate was bound to dispose of the case himself and that he had no power to send the case back to the Sub-Magistrate for disposal. The provision in clause II of section 349 of the Criminal Procedure Code that the Magistrate to whom the proceedings are submitted may pass such order as he thinks fit, means when taken in conjunction with the words immediately proceeding, viz, "judgment" and "sentence" that he may pass such other final order disposing of the case as he may think fit. We set aside the conviction of the accused by the Sub-Magistrate and direct the Sub-Divisional Magistrate to dispose of the case himself. SUNDARA AYYAR AND SPENCER, JJ.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

Re P. MUNEYYA (FIRST ACCUSED), PETITIONER.* 1911. December 13.

Perjury—Sanction of prosecution for—Criminal Procedure Code (Act V of 1898), sec 195—Conditional sanction

A sanction to prosecute for perjury given under section 195, Criminal Procedure Code, cannot be conditional

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of A GALLETTI, the first-class Sub-Divisional Magistrate of Bezwada, dated the 22nd day of March 1911, in Calendar Case No. 2 of 1911, according sanction to prosecute the petitioner herein under section 193 of the Indian Penal Code.

The facts of this case are stated in the following Order:—

The Public Prosecutor for the Government

T. Prakasam for the petitioner.

ORDER.—The order of the Sub-Divisional Magistrate is absolutely illegal. He says "provided that Silam Ramudu's *alibi* which is supported by the Second Court witness Papanna SUNDARA AYYAR AND SPENCER, JJ.

* Criminal Revision Case No 543 of 1911 (Criminal Revision Petition No 409 of 1911).

Re MUNEYYA. SUNDARA AYYAR AND SPENCER, JJ. Narasimham is found on investigation to be true, I sanction the prosecution of Parala Muneyya and Lingam Appayya for the offence of perjury and of Sikkala Papayya for presumably abetting them". No sanction can be granted of a provisional character in case certain conditions are satisfied in the future. It was the duty of the Magistrate before granting sanction to satisfy himself that there was, at the time of the order, a *primâ facie* case against the petitioners here.

We set aside the order.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

1911. December 6 and 15.

Re SUBBIAN SERVAI AND FIVE OTHERS (ACCUSED IN CALENDAR CASE No. 744 OF 1911 ON THE FILE OF THE SUB-MAGISTRATE OF PALNI).*

Theft of fish in irrigation tank—Fish, offence of theft of—dependent upon power of fish to leave the tank

Although the capture of fish in an ordinary irrigation tank will not of itself amount to theft, yet if the water in the tank become so low as to permit the fish leaving the tank the offence may be committed

Subba Reddi v *Munshoor Ali Saheb*, [(1901) I L R, 24 Mad, 81], explained

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code (Act V of 1898) by J. R. HUGGINS, the Additional District Magistrate of Madura, in his letter, dated 16th September 1911.

The facts of this case appear from the following Order :—

P. R. Grant for the Public Prosecutor on behalf of the Government.

AYLING, J. ORDER.—The accused were convicted of theft in removing fish from a Government irrigation tank. They pleaded guilty: but the District Magistrate relying on the ruling in the High Court Proceedings No. 663, dated 10th April 1880, has referred the case on the ground that the capture of fish in an ordinary irrigation tank does not amount to theft.

The ruling quoted, which has been followed in a later case, *Subba Reddi* v. *Munshoor Ali Saheb*(1), is authority for the

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* Criminal Revision Case No. 588 of 1911 (Referred Case No 120 of 1911).

(1) (1901) I.L.R., 24 Mad, 81.

general principle above referred to: but there is reason to doubt whether that principle is to be applied to all cases and under all circumstances or was intended to be so applied. A somewhat different view has been taken both by the Bombay and Calcutta High Courts: *vide* *Queen Empress* v. *Shaik A'dam*(1) and *Maya Ram Surma* v *Nichala Katani*(2). In the former case the tank in question was an enclosed municipal tank; but the *ratio decidendi* was that the fish, being unable to escape from the tank, were practically in the power and dominion of the owner so as to be capable of being the subject of theft. It has been pointed out that even in an open irrigation tank after the water has fallen to such an extent that both the supply and distribution channels are dry, the freedom of the fish is equally circumscribed and the learned Judges of the Calcutta High Court in the ruling above quoted appear to clearly recognise that under such circumstances a conviction for theft might be sustainable It was presumably in view of these considerations that MILLER, J., in the latest Madras case to which I have been referred—Re *Raghunadha Mahanti*(3)—held that each case must be decided on the particular facts thereof, in other words that the general principle laid down in *Subba Reddi* v. *Munshoor Ali Saheb*(4) and the earlier case was not universally applicable. He accordingly refused to interfere with a conviction based on very similar facts to those in the present case.

In this view I cannot but concur: though I fully realise the desirability of a more positive exposition of the law, if it were possible, and the drawbacks inevitably attendant on a state of affairs in which an act which is lawful today may become a criminal offence tomorrow and *vice versâ*.

In the present case the judgment gives no indication of the state of the tank but the District Magistrate says that the sub-magistrate's statement that the water was so low that the fish could not escape is probably correct. In view of this and of the fact that the accused pleaded guilty and have only been awarded small fines, I do not feel it necessary to call for further evidence or to interfere in any way with the conviction and sentence.

(1) (1886) I L R., 10 Bom, 193

(2) (1888) I L R, 15 Calc, 402.

(3) Criminal Revision Case No. 580 of 1909

(4) (1901) I.L R, 24 Mad, 81.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Sundara Ayyar.

1912. January 10, 11 and 17.

Re NARAYANASAMI NAICKEN AND ANOTHER (ACCUSED IN MISCELLANEOUS CASE No 2 OF 1912 ON THE FILE OF THE JOINT MAGISTRATE OF POLLACHI), PETITIONERS.*

Criminal Procedure Code (Act V of 1898), sec. 107, cl. 4; sec. 496, Bail—ss 344 and 167.

Section 107, clause 4, Criminal Procedure Code, makes an exception to the general rule laid down in section 496 which enacts that bail shall be given in all cases in which a person is not charged with a non-bailable offence.

Section 107, clause 4, compared with sections 344 and 167, Criminal Procedure Code.

PETITION to release the petitioners on bail pending enquiry of Miscellaneous Case No. 2 of 1912 on the file of H. A. WATSON, the Joint Magistrate of Pollachi, (Criminal Miscellaneous Petition No. 1 of 1912 on the file of F. N. HAMNETT, the Sessions Judge of Coimbatore).

The facts of this case are fully stated in the following *Order*:—

T. Rangachariar for the petitioners.

M. D. Devadoss for the Public Prosecutor on behalf of the Government

MILLER AND SUNDARA AYYAR, JJ.

ORDER.—This is an application for bail. The petitioners were arrested by the Police under section 151, Criminal Procedure Code, on the ground that the Police apprehended that they were about to commit house-breaking and theft. The petitioners were produced before the Sub-Magistrate of Udumalpet. He was of opinion that proceedings should be instituted against the petitioners under section 107 of the Criminal Procedure Code to take security from them for keeping the peace and sent them up to the Joint Magistrate of Pollachi. The Joint Magistrate before whom proceedings under section 107 are pending considered it necessary to detain them in custody pending the proceedings and he rejected their application to release them on bail. The Sessions Court of Coimbatore also dismissed an application made to it for bail. It is contended before us that the Joint Magistrate was bound to release the petitioners on bail

* Criminal Miscellaneous Petition No. 11 of 1912.

and that he had no discretion to refuse to do so. It is also urged that if he had such discretion the circumstances of the case did not justify his refusal of bail. The Joint Magistrate has given very good reasons for his opinion that it was necessary to detain the petitioners in custody until the completion of the enquiry under section 107, and the Sessions Judge has concurred in that opinion. We are unable to say that the discretion has been exercised wrongly, if the Magistrate was not bound to discharge the petitioners on bail The question therefore for our decision is whether he was bound to do so. Mr. Rangachariar for the petitioners relies on section 496 of the Criminal Procedure Code which according to him entitles any person (other than a person accused of a non-bailable offence), who appears or is brought up before a Court to be released on bail. We agree that the petitioner would be entitled to bail under this section, if there were no other section disentitling him to it, but section 107 clause (4) provides that a Magistrate before whom a person is sent under that section " may in his discretion detain such person in custody until the completion of the enquiry hereinafter prescribed." The petitioner in this case was admittedly a person sent under the section to the Joint Magistrate. The clause expressly gives power to the Magistrate to detain the person in custody until the completion of the enquiry. The contention on behalf of the petitioner is that this provision must be taken to be justified by section 496 It is argued for the Crown on the other hand that the general provision in section 496 must be taken to be subject to the special provision contained in clause (4) of section 107. Mr Rangachariar contends that the rule laid down in section 496 is intended to give an absolute right of bail in all cases where an accused person is in custody, whether under an order of Court or otherwise, but this contention appears to us to be untenable. Section 344 lays down that, in cases where it becomes necessary or advisable to postpone the commencement of or adjourn any enquiry or trial the Court may postpone or adjourn the same and may by a warrant remand the accused, if in custody. The explanation to the section provides that 'if sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand'. It will be observed, that the explanation refers to cases

Re NARAYANASWAMI NAICKEN.

MILLER AND SUNDARA AYYAR, JJ.

where further evidence may be obtained by a remand the object of the remand being to obtain further evidence. It cannot be held, that an accused person is entitled to bail where he is remanded under this provision, for to allow bail in such a case would frustrate the very object for which the remand is ordered by the Court. A similar observation would apparently apply where an order for remand is made under clause (2) of section 167. It cannot therefore be held that section 496 gives an absolute right to bail to any person who appears or is brought up before a court and is not charged with a non-bailable offence, but it must be read along with any other provision giving a special right of detention to a court and clause (4) of section 107 gives such special power. That provision may be compared with section 337, clause (3) which gives a Magistrate, tendering a pardon to an approver the power to detain him in custody until the termination of the trial by the Court of Session or High Court. The power is qualified by restricting it to cases where an approver is not on bail, but no such qualification is made in section 107 It is no doubt true that a person charged with a non-bailable offence is, except in cases falling within sections 334 and 167 entitled to bail, but the same considerations are not necessarily applicable to the two cases. The object of detaining in custody a person charged with an offence is generally only to secure his appearance for being dealt with according to law on the charge made against him, and the taking of bail would secure that object; but in cases of proceedings under section 107 taken for the purpose of preventing a person from committing a breach of the peace, the legislature may have regarded it as necessary to take steps to prevent him from doing so before the Magistrate decides whether it is necessary to take security from him. This object would not be secured by merely securing his appearance at the enquiry to be made under the section. There may be cases where a person charged under section 107 may appear to be so dangerous a character that it would be desirable to detain him in custody until the enquiry against him is completed. Mr. Rangachariar points out that no provision for such detention is made, where a person charged under section 107 is not sent up to the enquiring Magistrate by another Magistrate but the enquiring Magistrate himself orders the arrest of the person charged. It is no doubt true that section 114 only empowers the Magistrate

to order the arrest of the person concerned and does not provide that he may detain him in custody until the completion of the enquiry; but assuming that a person so arrested is entitled to be released on bail under section 496, we do not think that this anomaly is sufficient to justify us in not giving effect to the clear words of section 107 clause (4) which entitle the Magistrate to detain the person concerned in custody in cases to which that clause is applicable. The question is not covered by any previous decision. It was left expressly undecided in *Chidambaram Pillai* v. *Emperor*(1). In *Mewa Lal Thakur* v. *The Emperor*(2), all that was held was that bail cannot be demanded from a person against whom proceedings under section 107 are contemplated but no proceedings have been drawn up or issued. In *Raghunandan Pershad* v. *Emperor*(3) the Calcutta High Court held that except in the special circumstances referred to in clauses (3) and (4) of section 107 and which were admittedly not applicable to that case, the law did not empower a Magistrate to detain a person in custody until the completion of the enquiry, and that the Magistrate was bound to grant bail. On the whole we are of opinion that in this case the Joint Magistrate had the right to refuse to enlarge the petitioner on bail and we therefore dismiss this petition.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sadasiva Ayyar.

ANDIAPPA PILLAI (BY HIS AUTHORISED AGENT SENTHIVELU PILLAI) (PLAINTIFF), APPELLANT,

1912 February 14 and 17.

v

MUTHUKUMARA THEVAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sec. 568—"or for any other substantial cause," effect of—Power of an appellate court to admit additional evidence—'Other' not ejusdem generis—'to enable it to pronounce judgment', meaning of—Appellate Court, all powers of original court vest in.

An Appellate Court has power to admit further evidence under the clause "or for any other substantial cause" in section 568, Civil Procedure Code, which cause need not be *ejusdem generis* with the causes stated in the previous part of the section.

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(1) (1908) I.L.R., 31 Mad., 315. (2) (1906) 11 C.W.N., 415.
(3) (1905) I.L.R., 32 Calc., 80.
* Second Appeal No. 805 of 1910.

ANDIAPPA PILLAI v. MUTHU-KUMARA TEVAN.

Kessowji Issur v. *G.I.P. Railway Company* (1907) I.L.R. 31 Bom., 381 (P.C.) explained and distinguished.

Per SADASIVA AYYAR, J.—The expression "to enable it (the appellate court) to pronounce judgment" means to enable it to pronounce a *satisfactory* judgment; an appellate court has all the powers of an original court.

SECOND APPEAL against the decree of F. H. HAMNETT, the District Judge of Madura, in Appeal No. 512 of 1908, presented against the decree of T. K. SUBBA AYYAR, the District Munsif of Manamadura, in Original Suit No. 93 of 1907.

The facts of this case are set out in the judgment of SADASIVA AYYAR, J.

T. Rangachariar and *K. V. Krishnaswami Ayyar* for the appellant.

V. V. Srinivasa Ayyangar for the respondents.

BENSON, J.

BENSON, J.—*The substantial question argued in this Second* Appeal is whether the District Judge was right in allowing fresh evidence to be adduced at the hearing of the appeal.

It is contended for the appellant that the District Judge was wrong in so doing and that his procedure was not in accordance with section 568 of the Code of Civil Procedure (Act XIV of 1882), as explained by the Privy Council in *Kessowji Issur* v. *G.I.P. Railway Company*(1).

I am unable to accept this contention. The circumstances under which the additional evidence in that case was admitted were wholly different from the circumstances in the present case. In the present case, the District Judge after *hearing the* arguments by the pleaders on both sides observed that the District Munsif had not sufficiently considered the *olugu* account (Exhibit I) that he had, in fact, misunderstood it, that only part of it was filed and that certain documents which the appellant before him then produced would show that the District Munsif's explanation of it could not be correct. The District Judge also did not think that there could be two different tenures (*pannai* and *kudi* lands) in one and the same survey number, and he desired the remainder of the *olugu* account to be filed in order to see whether such entries could be found in other numbers entered in that account. It seems to me to be clear that the District Judge was in doubt as to whether there could be *pannai* and *kudi* lands in the same number

(1) (1907) I.L.R., 31 Bom., 381 (P.C.)

ANDIAPPA PILLAI v. MUTHUKUMARA THEVAN.

BENSON, J.

and required further evidence in order to clear up this point. He also required further evidence to test the District Munsif's explanation of the effect of certain entries in the *olugu* account, which explanation seemed to the District Judge to be wrong. He, therefore, needed or required the further evidence mentioned in his order to be produced in order to enable him to properly decide the appeal before him.

There was, in my opinion "substantial cause" for admitting the further evidence within the meaning of section 568 of the Civil Procedure Code, 1882, I do not think that the words "or for any other substantial cause" in that section should be construed in the narrow sense suggested by the doctrine of *ejusdem generis*, so as, in effect, to confine them to causes of the same kind as those stated in the earlier part of the section.

I would, therefore, confirm the decree of the District Judge and dismiss the Second Appeal with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The Lower Appellate Court reversed the District Munsif's judgment and dismissed the plantiff's suit, mainly on the strength of some additional evidence which the Appellate Court received during the hearing of the appeal. The only arguable ground in this Second Appeal is whether the District Court was so entitled in law to take and consider such additional evidence.

It has been held by the Privy Council in *Kessowji Issur* v. *G.I.P. Railway Company*(1) that Appellate Courts have no jurisdiction to allow parties to adduce further evidence unless section 568, Civil Procedure Code, 1882 (Order XLI, rule 27, Civil Procedure Code, 1908) allows it That section, as explained by the Privy Council, allows the Appellate Court to admit such further evidence if (*a*) the First Court had improperly refused to admit evidence, or if (*b*) the Appellate Court, on looking into the evidence as it stands, finds some inherent *lacuna* or defect which has to be filled up and supplied by fresh evidence before the Appellate Court finds itself in a position "to pronounce judgment," or if (*c*) there is any other substantial cause, and if in each case the reasons for admitting further evidence are recorded.

In *Kessowji Issur* v. *G.I.P. Railway Company*(1), their Lordships of the Privy Council found (*a*) that the First Court

(1) (1907) I.L.R., 31 Bom., 381 (P.C.).

ANDIAPPA PILLAI v. MUTHU-KUMARA THEVAN.

SADASIVA AYYAR, J.

had not improperly refused to admit evidence (*b*) that the Appellate Court *before looking into the evidence as it stood*, had admitted further evidence on a preliminary application (*c*) that there was no other substantial cause for admitting fresh evidence as the Original Court had on an application for review, refused to grant review or to take the further evidence offered, ... and (*d*) that the Appellate Court recorded no reasons before admitting such further evidence.

In the present case, I am inclined to hold on a careful perusal of the record that the District Court felt such serious doubts about the difficult and unusual tenure on which the disputed land No. 76 was held (partly *pannai* and partly *kudi*) that it directed and authorized further evidence to be received on both sides. The learned District Judge frankly says in one portion of his judgment that it appeared to him "improbable at first that the same field would contain *pannai* and *kudi* land," and that he had to change his opinion on further arguments. The expression "to enable it (the Appellate Court) to pronounce judgment" cannot surely mean "pronounce some judgment whether or not such judgment reasonably satisfied the mind and conscience of the Court pronouncing it that it has done its duty to find out the truth and mete out justice." In the Privy Council case in *Kessowji Issur* v. *G.I.P. Railway Company*(1), the Appellate Court allowed further evidence to be adduced without the learned Judges applying their minds to the question whether they required further evidence to pronounce a satisfactory judgment and hence their Lordships of the Privy Council disallowed the procedure.

Even supposing that I am wrong in my view as to the meaning of the phrase "to enable it to pronounce judgment," see *Subba Naidu* v. *Ethirajammal*(2), where two learned Judges of this court have differed as to the meaning of this clause (*b*) of section 568. There is the other phrase "for any other substantial cause" in the same clause (*b*) which enables the Appellate Court to receive further evidence. I am unable to adopt the doctrine of *ejusdem generis* in construing such a wide expression "any other substantial cause" Original Courts have, in

(1) (1907) I.L.R., 31 Bom., 381 (P. C.). (2) (1912) 22 M.L.J., 14.

order to do justice (which is the main object for which all courts exist), the power to send for and inspect documents on the records of any court *of its own motion* (Order 13, rule 10, Civil Procedure Code, 1908): they may ask "any person present in court" to give evidence or produce any document then in his possession (Order 16, rule 7), and may put any questions, relevant or irrelevant, to witnesses (Indian Evidence Act, section 165). The new section 151 of the Civil Procedure Code, 1908, which merely gives express sanction to what has always been implied, namely, to the doctrine that Courts of justice possess inherent powers to do all things necessary to mete out justice provided they do not exceed their jurisdiction might also be referred to in this connection. An Original Court can reconsider its own judgment on review on fresh evidence which it might allow a party to adduce if such evidence was not within his power to produce at the original hearing. An Appellate Court has all the powers of an Original Court to do justice (Order 41, rule 33).

In the case before the Privy Council, the Original Court refused an application for review of its judgment on further evidence offered and yet the Appellate Court (without assigning reasons admitted fresh evidence and hence the Privy Council criticized the Appellate Court's procedure. But, surely their Lordships did not mean to give lesser powers to an Appellate Court to admit fresh evidence *than the Original Court would have had in the case of a review.* The Original Court could admit fresh evidence on a review, subject only to certain conditions and for certain substantial causes The Appellate Court is, on principle, entitled to do so for the same substantial causes. If the Appellate Court after it pronounces a judgment could review its own decision on fresh evidence offered after satisfying the stringent conditions imposed on the party applying for a review, why should it not do so during the first trial itself of the appeal?

In the present case, I am of opinion that the Lower Court admitted additional evidence for such substantial causes as well justify a review by the Original Court (*see* the allegations in the affidavit put in by the plaintiff before the hearing of the appeal in the Lower Court explaining why he was unable to produce the additional evidence, Exhibits 2 to 5, before). The District Judge has given reasons in his longer order of 30th

ANDIAPPA PILLAI v. MUTHUKUMARA THEVAN

SADASIVA AYYAR, J.

September 1909 for admitting the further evidence though not in the shorter order of the same date endorsed on the defendant's application. I would, therefore, dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912. February 28.

SESHAGIRI ROW (DEFENDANT), APPELLANT,

v.

VAJRA VELAYUDAM PILLAI (PLAINTIFF), RESPONDENT.*

Limitation—Suit filed after limitation in wrong court—Return for presentation to proper court—Bar of limitation in spite of Limitation Act (XV of 1877), sec 14.

If a plaint is returned for presentation to the proper court on the ground of absence of jurisdiction in the court to which it was originally presented, the suit when presented to the new court is a new suit and cannot be regarded as *a continuation of the infructuous suit in the wrong court.*

This is the basis of section 14 of the Limitation Act (XV of 1877). Hence if the suit when originally filed in the wrong court would have been ordinarily barred by limitation as being barred during the holidays of that court, after which alone it was filed, the suit when filed in the new court must be held to be barred in spite of section 14 of the Limitation Act.

Mohidin Routhen v. Nallaperumal Pillai [(1911) 21 M L J., 1000], followed.

Takuroodeen Mahomed Eshan Chowdry v Kurimbux Chowdry [(1865) 3 W.R. (C.R.), 20] *Kaelat Chunder Ghose v. Nuseebunnissa Bibee* [(1871) 16 W.R. (C.R), 47], and *Assan v. Pathumma* [(1899) I.L.R., 22 Mad., 494], distinguished.

SECOND APPEAL against the decree of S. AUTHINARAYANA AYYAR, the acting Temporary Subordinate Judge of Coimbatore, in Appeal No 47 of 1909, presented against the decree of T. A. RAMAKRISHNA AYYAR, the District Munsif of Coimbatore, in Original Suit No. 958 of 1907.

The facts of this case are stated in the judgment.

T. Subrahmanya Ayyar for appellant.

V. Viswanatha Sastri for respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The facts of this case are quite similar to those in *Mohidin Routhen* v. *Nallaperumal Pillai*(1), and according

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* Second Appeal No. 433 of 1910.

(1) (1911) 21 M.L.J., 1000.

SESHAGIRI ROW v. VAJRA VELAYUDAM PILLAI

BENSON AND SUNDARA AYYAR, JJ.

to the decision in that case the suit is clearly barred; but it is contended that an argument of importance was not submitted to the court in that case, which would have materially influenced the judgment. That argument is that when a plaint returned for presentation to the proper court on the ground of absence of jurisdiction in the court to which it was originally presented is represented to the proper court, the suit itself must be regarded as a continuation of the infructuous suit in the wrong court. This argument cannot be upheld. Proceedings instituted without jurisdiction cannot be deemed to be legally valid so as to be capable of being continued in another court. In the case in *Takuroodeen Mahomed Eshan Chowdry* v *Kurimbux Chowdry*(1), cited for the appellant the suit was regarded as transferred from one court to another. In such a case of course it is the same suit that is continued in the court to which the transfer is made. The case in *Khelat Chunder Ghose* v. *Nuseebunnissa Bibee*(2), is not in point as there the question was not one of limitation though in one portion of the judgment the learned Judges who decided the case speak of the suit being the same where a plaint returned by one court is represented to another court. In *Assan* v. *Pathumma*(3), this Court held that the original plaint must be taken to have been merely amended and the case is therefore not similar to this case. *Abhoya Churn Chuckerbutty* v. *Gour Mohun Dutt*(4), is a decision against the respondent's contention. Section 14 of Act XV of 1877 proceeded on the basis that where a plaint was returned under section 20 of Act XIV of 1882 and presented again to another court, the suit must be regarded as a new one and not as a continuation of the former suit. We see no reason to differ from the decision in *Mohidin Rowthen* v. *Nallaperumal Pillai*(5). We allow the Second Appeal and dismiss the suit. We make no order as to costs.

(1) (1865) 3 W R, (C.R), 20
(2) (1871) 16 W R, (C R), 47
(3) (1893) I L R, 22 Mad, 494
(4) (1875) 24 W.R, (C R), 26.
(5) (1911) 21 M L J, 1000.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912. April 1.

MEDA VENGAMMA (PLAINTIFF), APPELLANT.

v.

MITTA CHELAMAYYA AND TEN OTHERS (DEFENDANTS), RESPONDENTS.

*Hindu Law—Widow's estate—Nature of interest arising out of contract with surviving co-parceners.**

P and *C* were undivided brothers of a joint Hindu family. *P* died. *C* entered into an agreement with *L* the widow of *P* whereby *P* was to receive a younger son of *C* (if such should be born) in adoption or in default a half share in the family properties. No adoption took place. *C* died leaving his widow *B*. *B* and *L* effected a partition of the properties in equal shares. The plaintiff was a daughter of *P* by another wife.

Held, that the half share taken by *L* was a widow's interest and that it would pass on her death to her husband's reversioners and the plaintiff being the nearest reversioner was entitled to succeed.

A woman's estate can be obtained by a Hindu female not only by inheritance but also by contract of parties, by a grant, or by prescription.

APPEAL against the decree of M. GHOSE, the acting District Judge of Cuddapah, in Original Suit No. 2 of 1907.

In this case one Pedda Tippayya died in 1868 leaving his widow Lakshmakka, (his second wife) and daughter (plaintiff) by his first wife, and a brother Chinna Tippayya. It was found by the Lower Court that Pedda Tippayya and Chinna Tippayya were undivided at the date of the former's death in 1868.

Seven days after Pedda Tippayya's death an agreement Exhibit IV was entered into between Lakshmakka and Chinna Tippayya by which the latter agreed to give her in adoption one of his younger sons which might in future be born to him and also agreed to give her a half share in the properties.

The following is Exhibit IV :—

Kararnama dated 6th December 1868 executed and given in favour of Lakshmakka, wife of Mitta Pedda Tippayya, son of Pedda Singanna, residing at Peddagutturu of Pulivendla taluk

* Appeal No. 73 of 1908.

by junior brother-in-law (Maridi) Chinna Tippayya, the terms of which are :—

As my brother your husband having died 7 days ago, what you have asked me to-day through Sunku Balayya Gari Peddarazu and other respectable persons is "your brother died in his youth without leaving issue to me, so if you were to beget sons in future, excluding the eldest son, you shall give one of the remaining sons in adoption to me as per my choice, according to shastras, and if we were not to be on good terms at any time, give us by partition our half share in the cattle, five metals, houses, topes, lands and thus enable us to obtain salvation." So I have agreed accordingly and executed and given you this *kararnama* which is as follows :—If I were to beget sons, I shall give you in adoption any one of my sons as per your choice excluding the eldest according to shastras, and I shall divide and give you your half share as aforesaid In case I beget only one son and no second son is born to me, I shall bring for myself as per my choice another boy from another quarter and give you in adoption and shall give you your half share in place of *my brother. If I were to fail either in bringing and giving you* a boy from outside, in adoption, or, if I were not to give you one of my sons, I shall give you a half share, after division, of the property. This *kararnama* is executed and given with my consent.

(Signed) Mitta Chinna Tippayya,
son of Pedda Singanna

He further agreed in case only one son was born to him to procure for her some boy of his own choice for adoption and to give her a half share in place of his brother. He finally agreed in default of his doing so to give "her half share in the property" after division. Chinna Tippayya having died his widow Bagamma and Lakshmakka effected in 1878 a division between themselves of the properties in equal shares—Exhibit XVI.

The arbitration *muchilika*, dated 5th day of Karteeka Sudha of Bahudhanya year (30—10—1878), executed and given in favour of (1) Subbayya, son of Mitta Chinna Singanna, (1) Do. Pedda Ramayya (1) Achappillagari Gangayya, (1) Vemulasenku Balayyagari Pedarauz, (1) Maddala Tiruvelisetti, (1) Gattasala Chinna Subbiah, (1) Ghattisala Pullayya of Pedda Jutturu of Pulivendla taluk of Cuddapah district jointly by the two,

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Lakshmakka, wife of Pedda Tippayya of Metta Pedda Singanna Garu, and Bagamma, wife of Do. Chinna Tippayya.

As we both of us have requested you to be arbitrators for our partition, therefore all the property consisting of the moveable and immoveables we had (*i.e.*,) houses, topes, lands, cattle and metals and to settle the disputes we had over this property, *i.e.*, Pendli vottalu, gifts and endowments, and disputes regarding the senior and junior shares as would appear to you the respectable people by which we shall be bound to hear and we shall be bound by any other decisions over and above as would be said by the abovesaid respectable persons. This arbitration deed is executed and given with our consent.

(Mark of) Lakshmakka.
(„) Bagamma.

The Honourable Mr. *T. V. Seshagiri Ayyar* for appellant.

The Honourable Mr. *P. S. Sivaswami Ayyar*, the Advocate-General and *S. Gopalaswami Ayyangar* for first respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—In this case the plaintiff is a daughter of one Pedda Tippayya by his first wife, and sues for the recovery of the properties mentioned in the schedules attached to the plaint. Pedda Tippapya had a brother named Chinna Tippayya, and had married a second wife, Lakshmakka, who was only about ten years old at his death. She died in February 1905. The plaintiff's case is that Pedda Tippayya and Chinna Tippayya were divided in interest, and that they effected an actual division of the moveable properties and the houses, but that the other properties remained in the joint enjoyment of both at the time of Pedda Tippayya's death in 1868. The plaint alleges that Lakshmakka, the widow of Pedda Tippayya, took possession of his properties after his death in 1868 and that the first defendant, who joined Lakshmakka, and was looking after her properties took possession of them on her death in 1905, and that he is wrongfully withholding them from the plaintiff. She denies that the first defendant who claims to have been adopted by Lakshmakka, was really adopted by her, and that Lakshmakka had any authority to adopt him. The second and the other defendants are made parties on the ground that they are in possession of some of the properties without any lawful title.

The first defendant contends that Pedda Tippayya and his brother Chinna Tippayya were undivided and that all the

family properties devolved on Chinna Tippayya on the death of his brother, that Pedda Tippayya a few days before his death gave authority to Lakshmakka to make an adoption to him, and that Chinna Tippayya also gave authority to Lakshmakka to adopt any one of his own sons except the first in the event of his begetting sons, or otherwise any other boy. The first defendant further contends that Chinna Tippayya also agreed to give a half share of the properties to Lakshmakka, and that subsequently the properties were divided. He further contends that he was adopted by Lakshmakka in the year 1881, and that he had since been in enjoyment of the properties obtained in the division in his own right as well as of other properties acquired by him subsequently, apparently out of the income of the property obtained at the division.

Issues were framed as to the question of the status of the two brothers, as to the capacity in which Lakshmakka took a half share in the properties, as to the factum and validity of the adoption of the first defendant, as to limitation, and as to the properties the plaintiff would be entitled to recover in case she was entitled to succeed as reversioner after the death of Lakshmakka.

Having reviewed the evidence their Lordships accepted the District Judge's findings that the brothers were not divided during the life-time of Pedda Tippayya, and that Lakshmakka had no authority to make an adoption.

We have now to consider the second issue, "In what capacity did Lakshmakka, the widow of Pedda Tippayya, take a half share in the property?" The learned vakil for the appellant contends that she took only a widow's interest in it as the representative of her husband Pedda Tippayya, and that the plaintiff as his daughter was entitled to succeed to it on the death of Lakshmakka. The learned Advocate-General on the other hand contends that as the two brothers were undivided in interest and the property passed by survivorship to the junior brother, Lakshmakka must be taken to have obtained the half share purely as a bounty. He contends that on the correct construction of Exhibits IV and XVI what she took was a gift from her brother-in-law, and that, even if under those documents she was intended to have only a life-interest, her right cannot be taken to be a widow's estate descendible to the reversionary heirs of her husband, and that on her death the

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reversion would pass to Chinna Tippayya or his heirs, and that the plaintiff in any event has no right to succeed to the property. If Lakshmakka was promised an absolute right to the half share under Exhibit IV or got it subsequently by division between her and Bagamma, the plaintiff, is of course out of Court, as she is only a step-daughter of Lakshmakka. In our opinion, Exhibits IV and XVI must be taken together in order to determine the right acquired by Lakshmakka in the half share of the family property; and taken with the circumstances of the case, we have no doubt that the intention of the parties was that she was to have the half share as the representative of her deceased husband. If she validly adopted a boy, this share would pass to him; otherwise she would continue to hold it. She was no doubt not entitled to partition as the widow of a deceased coparcener. But it seems to be clear that it was the intention of Chinna Tippayya to treat her as if she was entitled to such a share. For what reason he did so it is immaterial to consider. If Chinna Tippayya could in law validly give her a widow's interest, we feel no doubt that her half share must pass to her husband's reversioners and the plaintiff being the nearest reversioner would be entitled to succeed. The learned Advocate-General contended that a woman's estate could be obtained by a Hindu female only by inheritance, that such an estate cannot be created by contract of parties or by a grant. We are unable to agree with him. It is not denied that a Hindu female is capable of possessing two different kinds of estate passing by different rules of inheritance, namely a woman's estate, with respect to which she does not become a stock of descent and which passes after her death to her husband's heirs, and an absolute estate which passes to her own heirs, *i.e.*, the heirs to a woman's *peculium*. It has been decided by the Judicial Committee of the Privy Council that a woman's estate may be created in favour of a daughter by contract. See *Radha Prosad Mullick* v. *Ranimoni Dassi*(1) and *Karim-ud-Din* v. *Gobind Krishna Narain*(2). And in determining the character of the estate taken in any particular case the rule enunciated in *Mahomed Shumsool* v. *Shewukram*(3) must be borne in mind that "in

(1) (1908) L.R., 35 I.A., 118. (2) (1909) L.R., 36 I.A., 138.
(3) (1874) L.R., 2 I.A., 7 at p. 14.

construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." That such an estate could be created is assumed in *Sambasiva Ayyar* v. *Visiam Ayyar*(1) and *Sambasiva Ayyar* v. *Venkataswara Ayyar*(2), though the learned Judges did not agree on the construction of the particular instrument in the case as to whether it created a widow's estate or an absolute estate. It has also been decided that property could be given to a Hindu male with the incidents of ancestral property in which his sons would acquire a right by birth [See *Subbarayar* v. *Subbammal*(3) and *Sudarsanam Maistri* v. *Narasimhulu Maistri*(4), Per BHASHYAM AYYANGAR, J.; *Seth Jaidial* v. *Seth Sita Ram*(5) and *Munisami* v. *Maruthammal*(6).] We do not think that the observation in *Anandrão Vináyak* v. *Administrator-General of Bombay*(7), relied on by the learned Advocate-General throws any doubt on the possibility of such an estate being created In *Timannacharya* v. *Balacharya*(8) and *Bai Diwali* v. *Patel Bechardas*(9), there are observations to the effect that a stranger cannot give property to a Hindu impressing it with the character of ancestral estate. But assuming these observations to be well founded, they do not touch the present case where instead of an allotment for maintenance being made to Lakshmakka she is treated by her husband's coparcener more generously, and if given a half share of the property which her husband would have got on partition. The Advocate-General contended that to allow parties to create such an estate would enable them indirectly to contravene the provision of law that they cannot by grant create rights of property in favour of unborn or unascertained persons,

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(1) (1907) I L R, 30 Mad, 356 (2) (1908) I L R, 31 Mad, 179.
(3) (1901) I L R, 24 Mad, 214 (P C).
(4) (1902) I L R, 25 Mad, 149 at pp 154 and 155.
(5) (1881) L R, 8 I A., 215 at pp 227 and 228. (6) (1910) 20 M L J, 687 (F.B.).
(7) (1896) I L R, 20 Bom, 450 at p 465. (8) (1902) 4 Bom L R, 257.
(9) (1902) I.L R, 26 Bom, 445

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and he relies on the decision in *Nistarini Dassi* v. *Nundo Lal Bose*(1). That went in appeal to the Privy Council in *Benode Behari Bose* v. *Nistarini Dassi*(2). It was no doubt held in that case that a gift by will to the testator's reversionary heirs, whoever they might be after the death of his widow would be void. But it is no authority for the position that an estate known to and sanctioned by the Hindu law cannot be granted in favour of a Hindu female simply because the succession would pass on her death by law to her husband's heirs and not to the heirs to her *stridhanam* property. The heirs in such a case do not take under the grant itself but under the rules of law determining the line of inheritance to a particular kind of property held by the female owner. It has been decided that in the case of followers of the Marumakathayam law, a conveyance may be made to a woman with the incidents of tarward property so as to give a right to her unborn children. See *Kunhacha Umma* v. *Kutti Mammi Hajee*(3), *Kunhamina* v. *Kunhambi*(4) and *Katankandi Koma* v. *Sivasankaran*(5). The Advocate-General's agreement is really answered by the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6). There a Hindu executed a deed of gift of property in favour of his grandson and his brothers "who may be born hereafter." This gift was impeached as void on the ground that it was a gift to a class of persons some of whom were not born at the time of the gift. After deciding that the gift would take effect in favour of the grandson actually then existing, their Lordships observe as follows:—

"Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, Chapter vii, sections 10, 11 and 12, which is a Bengal authority, but it refers

(1) (1903) I.L.R., 30 Calc., 369
(2) (1906) I.L.R., 33 Calc., 180 (P.C.).
(3) (1894) I.L.R., 16 Mad., 201
(4) (1909) I.L.R., 32 Mad., 315
(5) (1910) 20 M.L.J., 131.
(6) (1883) L.R., 11 I.A., 164 at p. 179

to Vishnu and Yajnyavalkya authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely, but more closely, insisted on by the *Benares* school than by the *Bengal* school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between Satrujit's heirs on the one hand, and his brothers, if any should be born, on the other. They are only showing that the notions present to the mind of the head of a Hindu joint family who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

It has moreover been held that a Hindu female may by prescription acquire property impressed with the character of a widow's estate if the title she asserted during the time of prescription was that of a widow holding as representative of her husband. See *Bupanayya* v. *Peddichalamaiya*(1) and *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu*(2) It is unnecessary to consider whether a mere stranger can give property to a Hindu widow with the incidents of a widow's estate descendible to her husband's heirs. We think there can be no doubt that in circumstances like the present such an estate could be created. It amounts practically to nothing more than an allotment to Lakshmakka of a large share of the family property amounting to what her husband would have got at a partition instead of giving her a smaller portion which would be sufficient for her maintenance. We therefore hold that plaintiff is entitled to the properties of Lakshmakka.

The Lower Court has recorded no finding on the fifth issue. It will be requested to do so now after recording the evidence that the parties may adduce. The finding should be submitted within two months Ten days will be allowed for objections

In compliance with the order contained in the above judgment, the District Judge of Cuddapah submitted a finding. And on this Appeal coming on for final hearing after the return thereof the decree of the Lower Court was reversed with proportionate costs.

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(1) (1899) 9 M L J , 33 (2) (1897) I L R , 20 Mad , 256

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1912.
April 25.

V. JAMBULAYYA (DEFENDANT), APPELLANT,

v

I. RAJAMMA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XLI, rule 23—Decision of first court not on a preliminary point—Power of appellate court to remand.

There are cases in which an order of remand may be made even where the disposal has not gone on a point which can strictly be called a preliminary point.

Kuppalan v Kunjuvalli [(1911) 9 M. L. T., 373], followed.

A case in which there was no regular hearing of a matter by the first court and the evidence on which the disposal of the case was made by that court was not placed on record, is a fit one for remand.

APPEAL against the order of J. W. HUGHES, the District Judge of Kurnool, in Appeal No. 148 of 1908, presented against the decree of T. S. KRISHNA, the District Munsif of Kurnool, in Original Suit No. 767 of 1907.

The facts of this case appear from the judgment.

A. Krishnaswami Ayyar for appellant.

K. Parthasarathy Ayyangar for respondent.

MILLER AND SADASIVA AYYAR, JJ.

JUDGMENT.—The District Munsif appears to have looked at a receipt and construed it as a settlement out of court and upon it determined the issue whether the settlement after suit is true, but he did not exhibit it as evidence in the suit or taken any other evidence. It is not now alleged that this course was taken by consent of the parties or that the parties agreed that the matter should be disposed of on the construction of the receipt alone.

The District Judge appears to have seen the receipt and considered that it is not a record of the terms of a settlement between the parties, and holding that the plaintiff should be allowed to prove that the document represented only a partial settlement; he has remanded the suit for rehearing and disposal.

Before us it is contended that the District Munsif having determined the issue as to the settlement has not disposed of the suit on a preliminary point, and that therefore the District Judge had no power to order a remand.

* Civil Miscellaneous Appeal No. 114 of 1911.

But the decision in *Kuppalan* v. *Kunjuralli*(1) is an authority for holding that there are cases in which an order of remand may be made even where the disposal has not gone on a point which can strictly be called a preliminary point, and this we think is one of those cases. Here there seems to have been no regular hearing of the matter and the evidence on which the disposal was made was not placed on the record. The procedure is so irregular that we think an order for a complete retrial is required and on that ground we confirm the decision of the District Judge and dismiss the appeal with costs.

JAMBULAYYA v. RAJAMMA — MILLER AND SADASIVA AYYAR, JJ.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

P. AMMAN PARIYAYI AND THREE OTHERS (DEFENDANTS), APPELLANTS,

1912 April 24, 25 and 30.

v

M P. PAKRAN HAJI (PLAINTIFF), RESPONDENT.*

Charge—Government Revenue, due on land—Common burden—Payment by one sharer—Right to claim charge on other shares—No right to a personal decree

When several shares in the same land or when several lands are liable under a common burden (such as, Government revenue, as in the present case), the discharge of the whole burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums for which they were equitably liable. But the common burden being only on the land or lands and not recoverable from the sharers personally there can only be a charge and no personal decree.

Rajah of Vizianagaram v *Rajah Setrucherla Somasekhararaz* [(1903) I L R , 26 Mad , 686, (F B)], followed.

Alayalammal v *Subbaraya Goundan* [(1905) I L R., 28 Mad , 493], and *Parbhu Narain Singh* v. *Babu Beni Singh* [(1909) 14 C W N , 361], referred to.

Subramania Chetty v *Mahalinghasami Sivan* [(1910) I.L R., 33 Mad., 41 (F.B)], distinguished.

APPEAL against the order of remand of A. EDINGTON in Appeal No. 342 of 1910 presented against the decree of M. R. SANKARA AYYAR, the District Munsif of Koottuparamba, in Original Suit No 624 of 1909.

C. V. Anantakrishna Ayyar for the appellants.

T. K. Govinda Ayyar for the respondent.

The facts of this case are stated in the judgment of MILLER, J.

(1) (1911) 9 M L T , 373

* Civil Miscellaneous Appeal No 119 of 1911

AMMAN PARITAYI v. PAKRAN HAJI.

MILLER, J.

MILLER, J.—The District Judge bases his decision on the ground that the plaintiff and defendants are co-owners in the *parambas* on which the plaintiff has paid the land revenue, but the allegations in the plaint do not seem to support this view. The plaintiff in the plaint alleges that the defendants are by a *karar* which is not on the record, owners in *jenm* right of one of the three *parambas* contained in the survey field in question and that he himself is the owner in *jenm* right of the other two. The plaintiff does not claim any interest in the *paramba* of defendants, nor admit that the defendants have any interest in his *parambas*.

The District Munsif gave him time to amend his plaint and rely on the *karar* by which the *parambas* were divided but he failed to take advantage of the opportunity so given. If then the District Judge's order is to be supported it must be on the ground that the fact that the survey field is undivided for purposes of the assessment of the land revenue upon it, brings the case within the rule established so far as we are concerned by the Full Bench of this Court in *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(1). Now in that case both BHASHYAM AYYANGAR, J. (in the referring order) and BENSON, J., were inclined to hold that sections 82 and 100 of the Transfer of Property Act were applicable and the former learned Judge points out, that those sections would clearly have applied but for the fact that the property then in question was not strictly the "several properties of several owners." Here on the plaint the *parambas* are the 'several properties of several owners' and they are all charged by reason of the Revenue Recovery Act, with the payment of a single debt, the revenue assessed on the survey field. I have no doubt that BHASHYAM AYYANGAR, J., and I think also BENSON, J., would have held in the present case that the plaintiff is entitled to a charge by virtue of section 82, Transfer of Property Act read with the section 100.

I should be content to base my decision on the Transfer of Property Act on the authority of those learned Judges, but it may equally rest on the principle of equity on which both SUBRAHMANIA AYYAR, J., AND BENSON, J., rested theirs in the same case in delivering the judgments of the Full Bench. The principle does not, I think, depend on the parties being co-owners

(1) (1903) I.L.R., 26 Mad., 686 at p. 702 (F.B.)

in the lands: they must be co-sharers of the burden, and in this case, as the pleadings show the burden is common to the plaintiff and defendants because their lands are both charged with the payment of the whole revenue. It is true that defendants are not debtors of the Government not being the registered pattadars but their land is none the less subject to the burden and has been by the plaintiff relieved of it. But as the common burden is a burden on the land only, as the Government could recover the revenue only from defendants' land and not from them personally, so all that plaintiff is entitled to is a charge on the land for the amount, if any, paid by him.

I think, therefore, that though the District Judge is wrong in holding the plaintiff and defendants to be co-owners of the land, so far as the pleadings have at present disclosed their position, he is right in reversing the decision of the District Munsif on the second issue. I do not think we can or need decide what are the interests of the parties in the land. The plaintiff if he has paid the revenue is entitled to a charge on the lands and the other issues in the suit must be decided. I would, therefore, confirm the order of the District Judge and dismiss the appeal with costs.

SADASIVA AYYAR, J. SADASIVA AYYAR, J.—I entirely agree. The case of *Subramania Chetty* v *Mahalinghasami Sivan*(1) went upon the ground that a person who, as pattadar, pays the whole revenue on the pattah land cannot sue for a mere money contribution from the owner of a share in the pattah land, that is, cannot get *a personal decree* for money claimed as due on such share because neither section 35 of the Revenue Recovery Act, nor section 69 of the Contract Act gives the pattadar such right or imposes an obligation to pay on the owner of the 'share.'

The question whether when several shares in the same land or when several lands are liable under a common burden the discharge of the whole burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums they were equitably liable for was not gone into in *Subramania Chetty* v. *Mahalinghasami Sivan*(1), but was on the other hand expressly decided in *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(2). The reason why it was not gone into in *Subramania Chetty* v.

(1) (1910) I L R, 33 Mad, 41 (F B)
(2) (1903) I.L.R, 26 Mad, 686 at p 700 (F B).

AMMAN PARIYAYI v. PAKRAN HAJI.

SADASIVA AYYAR, J.

Mahalinghasami Sivan(1), was because the question did not arise in that case.

In the present case the plaintiff claims recovery of the proportionate sums chargeable as revenue in defendants' paramba both from defendants personally and by sale of defendants' parambas on which he claims a charge for such proportionate sums. It may be that *Subramania Chetty* v. *Mahalinghasami Sivan*(1), would prevent plaintiff from getting a personal decree against defendants for any portion of such amount. The case of *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(2), undoubtedly prevents him from getting such a personal decree for more than three years' dues. But the ratio of the decision in that case allows him clearly a charge on defendants' parambas for the proportionate dues, the limitation period being twelve years under article 132. The present suit claims a charge for the dues only six years before suit.

A co-owner or co-sharer may not be liable personally to contribute towards sums paid to remove a burden on his property also, the whole burden being jointly imposed on the payer's and his co-owner's property. He may not have cared to discharge the burden as he might have been content to lose the property itself as not worth the expense of the removal of the burden. It may, therefore, not be equitable to give a personal decree against him as the contribution required may be larger than the value of his property. But those considerations do not apply to the claim for a charge on his share for a proportionate share of the burden. The case of *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(2) in allowing such a charge has been followed in *Alayakammal* v. *Subbaraya Goundan*(3); the limitation to enforce such a charge being twelve years. I find also that in *Parbhu Narain Singh* v. *Babu Beni Singh*(4), the learned Judges while refusing plaintiff's right to rely on section 69 of the Contract Act, gave him a charge on the defendants' shares for the proportionate fraction of the amount paid by plaintiff to discharge the burden on all the shares.

The remand order of the District Judge is, therefore, right and the appeal will be dismissed with costs.

(1) (1910) I.L.R., 33 Mad., 41 (F.B.)
(2) (1903) I.L.R., 26 Mad., 686 at p. 700 (F.B.).
(3) (1905) I.L.R., 28 Mad., 473.
(4) (1880) 14 C.W.N., 261.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar.

Re PANGA MAISTRY (ACCUSED IN CALENDAR CASE No. 411 OF 1910 ON THE FILE OF THE JOINT MAGISTRATE OF GUNTUR, PETITIONER), APPELLANT.*

1912 November 15.

Planters Labour Act (Madras Act I of 1903), ss. 24 and 35—Imprisonment for refusal to perform contract, extent of.

Prosecutions and punishments under the Planters Labour Act (Madras Act I of 1903) cannot continue indefinitely. Only two terms of imprisonment may be awarded, once under section 24 and again once under section 35. The refusal of a maistry or a labourer under section 35 to perform his contract cannot be treated as a temporary refusal.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code (Act V of 1898), by E. W. LEGH, the Acting District Magistrate of the Nilgiris, in his letter dated 9th February 1912.

The facts of this case are stated in the following Order.

E. R. Osborne for the Public Prosecutor.

SADASIVA AYYAR, J.

ORDER.—The accused was sentenced to six weeks' imprisonment under section 24 of the Planters Labour Act (Madras) because he (being a maistry) failed to remain upon an estate for the term during which he agreed to supply coolies to the estate. Having undergone the six weeks' imprisonment imposed upon him, he was brought up again under section 35 of the Act before the Magistrate who directed him to complete the performance of his contract. He refused and thus made himself liable "to further prosecution and punishment" (see the wording of section 35). He was again therefore further prosecuted and punished with the maximum term of three months' rigorous imprisonment provided by section 24. He underwent that punishment also. On his release, a second time, the planter again brought him before the Magistrate for renewed directions and for renewed punishment but the Sheristadar-Magistrate refused to give further directions and to impose further punishment. One of his grounds was that it did not seem to be the intention of the

* Criminal Revision Case No. 90 of 1912 (Referred Case No. 8 of 1913).

Re Yanga Maistry

Sadasiva Ayyar, J.

legislature that prosecutions and punishments under section 35 should continue indefinitely.

The District Magistrate has made this reference on the ground that because section 35 says (at the end of the first paragraph) that "no conviction under this Act or imprisonment under such conviction shall have the effect of releasing any maistry or labourer from the terms of his contract or labour as the case may be," the further (second) prosecution and punishment provided for under section 35 will not prevent a third, fourth or fifth or any number of prosecutions and punishments. I think that the meaning of the provision is merely that the civil contractual obligation does not cease by the criminal courts' punishment for breach of the contract and not that a maistry or labourer could be punished indefinitely till he dies

The proviso to the section, though it applies to labourers, only indicates that even in the case of a labourer, no direction could be given to him to complete his contract after the expiry of one year from the determination of the original period. The Magistrate is given power to give only one direction after release from a first punishment for an offence and to warn the accused that he would subject himself to the "pain of further prosecution and punishment in case of his refusal" to obey that direction That refusal is a final refusal on the part of the maistry or labourer and he can be punished for that only once more. His refusal cannot be treated as a temporary refusal lasting only for the period of his punishment for that refusal and he cannot be made to repeat his refusal every three months and again and again punished.

Section 33, clause (2), shows that his refusal may be revoked by the maistry or labourer during the time of his imprisonment and the Magistrate on the planter's application may cancel the remainder of the sentence which is being undergone by the accused and make over the accused to the planter to complete his contract. All this shows that the argument that the Magistrate could go on imprisoning a maistry indefinitely, obtaining periodical refusals from him cannot be accepted for a moment.

The Sheristadar-Magistrate was therefore perfectly justified in refusing to give directions to and to punish the maistry further.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Miller, Mr. Justice Munro and Mr. Justice Abdur Rahim.

THE OFFICIAL ASSIGNEE OF MADRAS (AND AS SUCH THE ASSIGNEE OF THE PROPERTIES AND CREDITS OF MESSRS. ARBUTHNOT & CO., INSOLVENT PETITIONERS) (COUNTER-PETITIONER), APPELLANT,

1910, March 4 and 16

v.

D. RAJAM AYYAR (PETITIONER), RESPONDENT.*

Banker and customer—Payment to bank with instructions as to disposal, effect of—"In suspense" account, meaning of.

When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank, and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B*.

Held, on appeal from *The Official Assignee of Madras* v. *Rajam Ayyar* (1910) I.L.R., 33 Mad., 299, by MILLER and MUNRO, JJ., that the bank held the amount as agents of *A* for remittance to *B*, and not as bankers either of *A* or *B*.

The Official Assignee of Madras v. *Smith* [(1909) I.L.R., 32 Mad., 68], distinguished.

PER ABDUR RAHIM, J.—That the relationship between the bank and *B* was not that of debtor and creditor and that the bank held the money in a fiduciary capacity as bailee or agent. A banker holding money of a person "in suspense" does not treat it like an ordinary customer's money.

The Official Assignee of Madras v. *Smith* [(1909) I.L.R., 32 Mad., 68], dissented from.

APPEAL under section 15 of the Letters Patent Act (24 and 25 Vict., Cap. 104) against the judgment, dated the 29th September 1909, of the Hon. Mr. Justice ABDUR RAHIM in Original Side Appeal No. 26 of 1908, presented against the order of the Hon. Sir CHARLES ARNOLD WHITE, the Chief Justice, the Insolvency Commissioner, dated the 16th March 1908, in Petition No. 181 of 1906.

The facts of this case are given in *The Official Assignee of Madras* v. *Rajam Ayyar*(1).

D. M. C. Downing for the appellant.

K. P. Madhava Rao for the respondent.

MILLER, J.—This is a somewhat peculiar case. The Madras Railway Company remitted money to Messrs. Arbuthnot & Co., to the credit of the claimant, Rajam Ayyar. Arbuthnot & Co. informed Rajam Ayyar, who was not one of their customers, that this had been done and asked for his instructions. But before he could instruct them they suspended payment. Now it

* Letters Patent Appeal No. 143 of 1909.

THE OFFICIAL ASSIGNEE OF MADRAS v. RAJAM AYYAR.

MILLER, J.

seems to me that in this case the principle enunciated in *The Official Assignee of Madras v. Smith*(1) is not applicable. The Madras Railway clearly did not intend Messrs. Arbuthnot & Co. to use the money as their bankers, and Arbuthnot & Co., it seems to me could not possibly have done so. They were not the bankers of the Railway Company and the money remitted was not an advance to them by the Railway Company; it was money due to and in course of remittance to a third party and Messrs. Arbuthnot & Co. did not treat the money as money lodged with them as bankers. In their letter to Rajam Ayyar they suggest that if he desires to open an account with them he can do so, indicating clearly enough that till he does so, they are not his bankers. It is not clear why they received the money from the Railway Company, but possibly they hoped to get a new customer; for some reason they did receive it, but I do not think they held it as bankers of Rajam Ayyar. They held it so far as the evidence shows as agents of the Railway Company for remittance to Rajam Ayyar.

Mr. Downing argues that the money should be treated as money remitted to Arbuthnot & Co. by Rajam Ayyar without instructions; we must, he says, assume that Rajam Ayyar asked the Railway Company to remit to Arbuthnot & Co.

It is no doubt probable that some such request was made, but I am not prepared to assume against Rajam Ayyar that he did more than ask that the money might be sent to him through Messrs. Arbuthnot & Co. It would not be right to assume more than this seeing that he was not a customer of Messrs. Arbuthnot & Co., and so far as I know gave no instructions himself to Messrs. Arbuthnot & Co.

I find nothing here to raise the presumption that Messrs. Arbuthnot & Co. received or were intended to receive the remittance as bankers and I think therefore that the Appeal must be dismissed with all costs out of the estate.

MUNRO, J.

MUNRO, J.—The distinction drawn by MILLER, J. between this case and *The Official Assignee of Madras v. Smith*(1) seems to me to be a real distinction though I do not think it was seriously insisted upon at the former hearing. I therefore agree to the proposed order.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I agree that the appeal should be dismissed for reasons which I have stated at length in the appeal against the order of the learned Commissioner in Insolvency.

Messrs. *King and Partridge*, attorneys for the appellant.

(1) (1909) I.L.R., 32 Mad., 68.

PRIVY COUNCIL.

VAITHINATHA PILLAI (APPELLANT),

v.

THE KING-EMPEROR (RESPONDENT).

P.C.* 1913. June 16, 17, 18 and 19. July 24.

[On appeal from the High Court of Judicature at Madras.]

Privy Council, practice of—Appeal in criminal case—Case where some substantial and grave injustice has been done—Conviction on partly inadmissible, and unreliable evidence—Principles governing interference with verdict of Criminal Court in India—Costs where appeal of accused person succeeds.

Special leave to appeal in a criminal case may be granted where "by some disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, some substantial and grave injustice has been done."

In re Dillet (1887) L.R., 12 A.C., 459, *per* Lord WATSON, followed.

In this case in which the appellant had been tried with others and convicted of abetment of murder, and sentenced to death, Their Lordships, in allowing the appeal, were of opinion that injustice of the kind abovementioned had been done, inasmuch as a vast body of inadmissible evidence, hearsay and other, had been admitted; that when admitted it had been used to the grave prejudice of the appellant; and that at the end of the hearing before the Judge of First Instance there did not exist any reliable evidence upon which a capital conviction could be safely or justly based.

Held, that under these circumstances whatever doubts their Lordships might have of the appellant's innocence, or whatever suspicions they might entertain of his guilt, or however great might be their reluctance to interfere with or overrule the decisions of the Indian Courts in criminal matters, the conviction should not be allowed to stand

Held, also that this case was not one of disturbing the verdict of the Judge of a criminal court in India who having seen and heard the witnesses had believed them and founded his decision on their testimony, it was the reverse of that, because in this case the Judge who saw and heard the witness upon whose evidence the conviction was mainly based, did not think his evidence so reliable that he could act upon it alone, and had, therefore, ordered the discharge of the other accused implicated by it.

Costs of a successful appeal were not allowed as against the Crown.

Johnson v *Rex* [(1904) A.C., 817, at p 824], followed

APPEAL from the orders (19th June and 5th August 1912) of the High Court at Madras in the exercise of its Appellate

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* *Present*:—Lord ATKINSON, Lord PARKER of Waddington, Sir SAMUEL GRIFFITH, Sir JOHN EDGE and Mr AMEER ALI.

VAITHINATHA PILLAI v. KING-EMPEROR.

Criminal Jurisdiction, which confirmed the conviction and sentence to death (1st April 1912) of the appellant by the Court of the Additional Sessions Judge of Tanjore.

The following is a brief summary of the main facts of the case which will be found fully stated in the judgment of their Lordships of the Judicial Committee:—

The charge against the appellant, who was a wealthy landowner of Pandi in the Tanjore district of the Madras Presidency, was abetment of the murder of one Dhanam, the wife of his eldest son Aiyasami on the night of the 22nd and 23rd October 1911, at the house of the appellant with whom Aiyasami and his wife, with others of the family, were then living. On the night of the murder, admittedly, the husband and wife retired to bed together. About 2 or 3 o'clock A.M. Muttachi, Aiyasami's maternal grand-mother, who was sleeping in an adjoining room, was, according to her own account, awakened by a noise which seemed to come from the room occupied by Aiyasami and Dhanam, which she entered and found Aiyasami standing over the body of his wife with a blood-stained *aruval* (hatchet) in his hand with which he was hacking the body. Muttachi gave the alarm and the appellant and other inmates of the house came in. About 6 A.M. Sami Thevan, the village munsif, Aiyasami's paternal uncle, with whom he had been brought up, came to the house, and the appellant reported to him what had occurred. Aiyasami being by the corpse of his wife but making no attempt to deny the charge, and in no way incriminating his father. The village munsif reported the matter to the police and the nearest Magistrate naming Aiyasami as the murderer, and at an inquest held on the same day the finding was that Aiyasami was guilty of the murder; that finding being based on the evidence of Muttachi, the present appellant, Thanga Babu, his widowed daughter, who lived in his house, and Kathiresan and Arunikonam, his servants.

Aiyasami was thereupon arrested and charged with the murder; but was eventually discharged, the Sub-Magistrate stating that "the evidence against the accused is hopelessly improbable of belief" and that "there is next to no evidence" against him. The defence was to the effect that the appellant, and Thanga Babu, his daugher, had instigated other inmates of the house to murder Dhanam, and that they "brutally killed

her and laid her out on her bed and forcibly put a bloody cloth on Aiyasami, and accused him of the murder." After commenting on the evidence at considerable length the Deputy Magistrate said: "All the circumstances go to point the suspicion against the accused's father" (the present appellant), "step-sister" (Thanga Babu), "step-brother Kalyanam, the servant Kathiresan and others. This will be further investigated."

The appellant, his son Kalyanam, his daughter Thanga Babu, his elder wife Kanthimathi, his servants Kathiresan, and Avanikonam, Thiagan and his brother Somu were thereupon charged with having committed the murder. Kalyanam and Somu absconded. The others were brought, on 4th January 1912, before the Sub-Divisional Magistrate of Masinagadi. Thiagan, who had made a confession implicating all the others who were charged, was granted a pardon and subsequently gave evidence as an approver on 8th January 1912. Aiyasami was then called and for the first time told the same story as that of Thiagan, an account of the murder which entirely contradicted all his previous statements to the police and to the Second-class Magistrate, as well as the story put forward in his defence on his own trial An application was made on 10th January by the appellant to be allowed to cross-examine the approver, but no opportunity of doing so was given him. Kanthimathi was discharged by the Magistrate, and the appellant, Thanga Babu, Kathirasan and Avanikonam were committed for trial to the Court of the Sessions Judge of Tanjore, Kathiresan being charged with murder under section 302 of the Penal Code (Act XLV of 1860), and the others with abetment of murder; the appellant and Thanga Babu under sections 302 and 114, and Avanikonam under sections 302 and 109 of the Penal Code. The Sessions Judge convicted the appellant only of abetment of the murder, the other three being acquitted. After a lengthy discussion of the circumstances and the evidence before him the Sessions Judge concluded his judgment as follows:—

"I find accordingly that there is no satisfactory evidence to establish the details of the approver's story; but I find that the murder must have been committed by some of the inmates in Vaithinatha Pillai's house that night; and the cloths (M.O's. 3 and 4) afford conclusive proof that more than one man assisted in the murder. I find also that the specific account of the

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murder given by the first accused and by his mother-in-law is demonstrably inconsistent with facts; that his conduct after the murder indicates a guilty conscience; and that he was the only one of the inmates of his house who is proved to have had any motive to murder Dhanam. On these findings I convict first accused Vaithinatha *Pillai* of abetment of murder punishable under section 302, read with either section 109 or 114 of the Penal Code, since he is said to be physically incapable of having inflicted the injuries with his own hand; and I sentence him to be hanged by the neck until he is dead. The sentence is subject to confirmation by the High Court. I do not think that there is sufficient evidence to establish beyond doubt how or where the murder was actually committed or that either Kathiresan or Avani or Thanga Babu assisted in it, though it is highly probable that the former were amongst the agents employed by the first accused. I, therefore, acquit them and discharge them.

"I have endeavoured in the foregoing paragraphs to give my findings and the reasons on which they are based as concisely as possible, and I have avoided any attempt to discuss the motives which may or may not have actuated the various witnesses on either side to give true or false evidence, or to deal with facts which are not material to the case in the view which I have taken of it. It has been argued generally that the object of this prosecution, which, according to the defence is inspired by two of Vaithinatha Pillai's enemies, Thiagaraj Pillai and Kadirvelu Chetti, is to involve all the members of Vaithinatha Pillai's family with whom Aiyasami is on bad terms or whose interests are opposed to Aiyasami's. For the prosecution it is argued generally that Vaithinatha Pillai is a tyrant who terrorises his village and his relations, and hence the difficulty of obtaining straight-forward evidence. There appear to be some grounds for both these arguments, and I should not care to place implicit reliance on the evidence of any of the private witnesses in this case as a whole, or regarding matters which affect their own interests. For this reason I have not thought it necessary to discuss in detail the suggestions made by the prosecution to discredit the impartiality of Muttachi on the arguments with which the defence have met them. It appears to me sufficient for the purposes of this case to find that the contents of Muttachi's evidence are incoherent and inconsistent with proved facts. Similarly, with regard to the evidence of the village munsif, many of his statements regarding the previous history of Aiyasami and the relations between the rival families are in favour of the defence, yet he admittedly sympathises with Aiyasami, and is not

on good terms with Vaithinatha Pillai. It might be assumed, therefore, that his evidence is generally reliable; but a comparison of it with his previous statements tends rather to discredit it and there are indications, as I have shown from Saminatha Pillai's evidence, and from the time when the reports were despatched, that the village munsif did not do his duty honestly in the first instance. For the present case I have relied on his evidence mainly to corroborate the account given by the police of the circumstances in which the body was found, and to prove the past family history, and the present state of feeling between the various relations. I have dealt sufficiently already with the general considerations that arise in dealing with the evidence of the approver and of Aiyasami."

The approver's evidence the Sessions Judge had disbelieved, and of Aiyasami's evidence he had said:

"Aiyasami is of course an interested witness since he was originally charged by the police with the murder, and is still charged with it by the defence. A verdict of acquittal in this case would not mean a verdict of guilty against Aiyasami, nor would it necessarily mean that further proceedings would be taken against him; but he is not yet safe. On the other hand the accused is his father. Aiyasami is admittedly dull and weak minded (the defence theory is that he is mad), and he was subject to a most severe cross examination, much of it consisting in a persistent effort to confuse him by confronting him with former statements which he made to the police and magistrates when he was himself under arrest, and with the explanations and comments on those statements which he gave in court in the preliminary inquiry in this case. All this affords some excuse for the poor figure he cut in the witness-box. But though I do not wish to apply a meticulous standard of criticism to his evidence I do not think that it will bear the test of examination."

The first assessor had found all the accused not guilty; and the second assessor had found all the accused guilty except Thanga Babu "as she was not present at the time when the murder took place"

Vaithinatha Pillai appealed to the High Court, and the appeal came before a Divisional Bench consisting of BAKEWELL and SADASIVA AIYAR, JJ, who differed in opinion the former upholding the conviction, and the latter coming to the conclusion that the appellant should be acquitted. The case was consequently referred to a third Judge SANKARAN NAIR, J., who agreeing with BAKEWELL, J., was of opinion that the appeal should be dismissed.

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The material parts of the judgments were as follows:—

BAKEWELL, J.—(*after commenting at length on the evidence*) said:

"I am of opinion that the defence failed to prove any tendency on the part of Aiyasami to homicidal mania, and, since no other explanation or motive had been adduced, that he is innocent of his wife's death. Aiyasami's conduct is entirely consistent with his character and innocence; he is found standing by his wife's body, rendered apparently stupid and inert by the death of one to whom he was attached, and on whose intelligence he had been accustomed to rely; he offers no confession such as a homicidal maniac might have made, and makes no attempt to fly from justice, and at first brings no accusation against anyone. It is only later when the magistrate arrives, and after he has for some hours been treated as the murderer of his wife by all around him, including his father, that he is roused to point out that father to the magistrate as the real culprit, and it is not until he finds himself in the actual custody of the police that he makes a statement incriminating his nearest relations.

"The conduct of his relations, who now say that they regarded him as a violent maniac capable of killing his dearest relation is altogether inconsistent with that belief. They allowed him to remain free and unfettered, with the weapon with which the deed was done close to his hand, and able to do his worst in case the homicidal fit were not expended. Surely, under the circumstances supposed, the most ordinary caution would have prompted his relations to remove the weapon from him, and to place him under restraint until the authorities arrived. His position, however, near the body and the weapon, with a bloody cloth upon the floor, is an arrangement which would suggest to the first stranger who arrived that Aiyasami was a culprit taken almost in the act.

"It is not suggested by the defence, nor by any of the facts of the case, except the evidence of the approver, that the crime would have been committed by any person outside the household of the accused. At the time of the occurrence besides Aiyasami, the old woman Muttachi and the children, there were within the house, the first accused, his wife and his daughter, the third accused in the hall, and his son Kalyanam in the second kattu. On the pial outside the hall-door were two men, second and fourth accused, servants of first accused, and possibly Somu, another servant. Kalyanam and Somu whose evidence would have been very valuable for the defence, have absconded.

"Assuming, as I do, that Aiyasami is guiltless of his wife's death one man at least would be required to prevent his interference, probably more than one, since it does not appear that he was injured in any way, or bore any signs of a struggle; two persons at least would be required to hold the woman, since it is extremely improbable that the blows can have been struck while she was asleep with Aiyasami close beside her; and one man of considerable strength must have dealt the blows, since the gold thali of some thickness round the neck was cut in two, and the lower jaw on the right side was fractured by the counter-coup.

"According to the evidence of Col. Wright (fourth Defence Witness) the first accused would probably be unable to deal such blows himself, and it seems highly improbable that Kalyanam, who is said to be a boy of about sixteen, or either of the women would have sufficient strength or brutality. The inference is irresistible that assistance must have been called in from outside the house and the only person who could have procured that help is the first accused. It is impossible that the third accused or her brother, or the first accused's wife could have persuaded the servants of the first accused to do such an act without their master's knowledge and concurrence. It is also improbable that the crime was planned by one of the women, since, as the learned counsel for the defence has pointed out, they would have instinctively resorted to poison The manner in which the crime was perpetrated shows a man's hate, violence and brutality

"The following inferences may be drawn from the facts which I have already discussed with respect to the cot and the position of the body. Aiyasami and his wife lying lengthwise, *i.e.*, east and west on a mattress spread over a cot and bench, his wife was moved and placed across the bed with her head on the pillow, because the railing at the head of the bed would make it extremely difficult for anyone to hold her head and feet, and for another person to deal the blows at her neck, but owing to her struggles on the mattress some of the blows fell on her head, shoulder and chest, and caused punctured wounds and slight cuts The blood spurted out from her neck along the pillow, and soaked into it near the neck, and also ran down to the floor The body was then arranged on its back, and the feet placed on a stool, and the waist cloth and sheet were arranged to cover the body.

"It is possible also that some of the ill-directed blows were dealt by the first accused and that, finding he was unequal to the task, he relinquished the weapon to another; this would explain Aiyasami's first statement (Exhibit 5) that 'my father cut with one stroke . . .

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when at dawn I went and saw there were other cuts that had been made.'

"I may observe that these facts and the inferences drawn from them are inconsistent with the theory that the act was done by Aiyasami alone in a fit of mania.

"I agree generally with the Sessions Judge's observation as to the conduct of the first accused *after the commission of the murder*, subject, however, to the following remarks:—Pichiappa Thevan (Defence Witness No. 6) says he went to Pandi about two hours after daybreak, not at 5 A.M; Prosecution Witness No. 7 says he sent Appavu and Kuppan to the monegar to take messages to Isanagudi and Oratur, and Appavu (Prosecution Witness No. 8) says that Prosecution Witness No. 7 told him the deceased died of cholera, while the monegar (Court Witness No. 3) denies that he told Prosecution Witness No. 7 the cause of death, or that he told him to say she died of cholera. Court Witness No. 3 says that he sent the messages of his own accord after he had fetched the village munsif which he did without speaking to the first accused. It also seems very doubtful whether Saminatha Pillai (Court Witness No. 6) would take it upon himself to give an opinion about the cremation of the body in opposition to his superiors. These witnesses are all *friends or dependants of the first accused and would probably* be reluctant to say anything which would tell against him, and the judge and assessors who heard and saw the witnesses are much more competant to express an opinion upon their evidence than we who have only the printed record before us.

"The last remark applies with special force to the evidence of Aiyasami who is the only professed eye-witness of the occurrence whose evidence is in my opinion, of any value. The Sessions Judge points out that Aiyasami is admittedly dull and weak-minded, and was subjected to a most severe cross-examination which afforded some excuse for the poor figure he cut in the witness-box and is of opinion that his evidence will not bear the test of examination; and he rejects it so far as relates to the position in which Aiyasami and his wife went to sleep upon the cot, and the presence of the approver. He, however holds that the statement (Exhibit S), was made by Aiyasami voluntarily and on his own impulse. This statement, his pointing to his father as described by Prosecution Witness No. 3, and his statement to the sub-inspector (Prosecution Witness No. 5) all go to corroborate his oral evidence *that the first accused* was present and took the principal part in the murder of his wife.

"I have refrained from discussing the evidence of the approver (Prosecution Witness No. 15) because for the reasons given by the Sessions Judge, as well as from the nature of his evidence and the manner in which it appears to have been given, I am of opinion

that no reliance whatever can be placed upon it. If the evidence of Saminatha Pillai (Court Witness No. 6) is true Thiagan, the approver, came running up to the house after he heard the cries, and was then not present at the murder, and can only be giving a garbled account of what he was told by the inmates. His knowledge of what had taken place, and his fear of being implicated with his fellow-servants in the crime would explain his flight, and the invention of an account of the crime which would involve the guilty parties while exculpating himself as much as possible.

"The Sessions Judge, however, accepts his evidence with respect to the changing of the cloths, and since it is corroborated by other witnesses I think it may be accepted There seems no doubt that Aiyasami was wearing a white cloth spotted with blood early in the morning, and was afterwards wearing a reddish cloth also spotted with blood; and the fact that the white cloth was left near the body would suggest to the authorities when they arrived that Aiyasami had attempted to change his cloth. The fact that the reddish cloth is also spotted with blood goes to show, as the learned Judge argues that another man besides Aiyasami was also present at the murder.

"The action of the first accused in charging his son with the crime is to my mind very strong evidence of his own guilt. If the evidence as to the proposal to cremate the body is not accepted, and the evidence of Court Witness No 6 is at least doubtful, the first accused made no attempt to shield his son during the hours that elapsed before the arrival of the authorities, but was prepared by the removal of his son as well as of his daughter-in-law to secure himself and his property from further molestation

"I think that the evidence of Aiyasami that the first accused instigated and was present at the death of the deceased woman is fully corroborated by the other facts which have been proved, and I would confirm the conviction and sentence of the lower Court"

SADASIVA AIYAR. J. (after saying that the Sessions Judge "rightly disbelieved the story of the approver, Thiagan, and I have no doubt from the evidence of Court Witness No. 6 and Court Witness No 4 that he was not in Vaithinatha Pillai's house at all on the night of the 22nd October, and came only next morning after sunrise. His story bears the impress of pure concoction Nor does the Sessions Judge believe the evidence of Aiyasami," and commenting on the rest of the evidence) concluded as follows :—

"In short, I find that all that the prosecution rely on in this case against the prisoner are (to use the vigorous language of the

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Sessions Judge) 'unduly subtle' and 'far-fetched' suggestions which in my opinion cannot bear the weight of any serious examination. The Sessions Judge himself admits that one of the suggestions of the prosecution seemed to him at first too subtle and far-fetched, and further admits that the Deputy Magistrate (who acquitted Aiyasami, and had the prisoner put under arrest) acted upon theories with some of which the Sessions Judge could not agree. The Sessions Judge's view that some person or persons (name unknown) must have been abetted by the prisoner, seems to me (with due respect), to rest on too slender foundations to base the prisoner's conviction thereon. The approver said (Exhibit P) that he on the early morning of the 23rd October itself came to know the 'Muller Shanan who comes to Rama Nadan's house' was the assassin, but the prosecution never tried to secure or charge this man, and in fact the approver's story was evidently never believed by anybody. It depicts the prisoner as possessed of not only diabolical cleverness and hypocrisy combined with unnatural cruelty, but also with the power of imposing his will and views on every one around him, including his enemy the village munsif, and the police and Magistrate who came to investigate. Truth is, no doubt, sometimes stranger than fiction but that cannot justify a Court in accepting an incredible story as truth without sufficient evidence simply because it contains sensational details, and there is not any reliable evidence in the case worth the name to establish the prisoner's guilt or even the theory that the prisoner is such a human monster as is depicted by the approver. The Deputy Magistrate in Exhibit XXVII expresses grave suspicions against the prisoner, the police take up the clue, an approver is forthcoming after several days, his dull imagination is somehow stimulated to create a story in accordance with the theories propounded by the Deputy Magistrate, and the story is made to soak well in his mind for more than a week before it is reduced to writing (Exhibit O) on 14th December, though the approver is anxious to give it out from 8th December itself.

"The slant and parallelism of the several wounds, the placid features of the corpse and the other grounds mentioned in Col. Hasell Wright's evidence also indicate that the injuries were inflicted by one man hacking in a frenzy while the victim was lying at a height of a few feet from the ground and not by a hired assassin who merely wanted to kill his victim for mercenary or other considerations while the victim was lying and being held on the ground level. Both the prosecution and the defence put forward before us in argument some far-fetched theories (I might also use the word 'speculations'), the honesty of the police inspector Krishna Ayyar

(Prosecution Witness No. 5) being attacked by the prosecution itself, while the defence went so far as to suggest that the approver's confession (Exhibit O) was manufactured and forged by the Sub-Magistrate (Prosecution Witness No. 18) several days afterwards. (I must however add that Dr. Swaminadhan and Mr. Sadagopachariar who appeared for the defence practically gave up this latter suggestion at the subsequent stages of their arguments). The danger of indulging in such speculations without having regard to the actual evidence and the broad possibilities of the case seems to me to be well exemplified in the numerous unsupported suggestions which appear in the records of the Lower Courts and which are likely to cloud the dispassionate consideration by the Courts of the actual facts and circumstances. In the result I have come to the clear conclusion that the evidence is wholly insufficient to convict the prisoner of the abetment of the murder of his daughter-in-law Dhanam, and agreeing with one of the assessors in the sessions trial, I would acquit him and order him to be set at liberty "

SANKARAN NAIR, J. (after stating the facts) continued :—

"The prosecution examined an approver, Thiagan, who swore to having witnessed the actual murder: He was disbelieved by the Sessions Judge, and his evidence was not relied on before me.

"The direct evidence in this case is that of the two witnesses Muttachi and Aiyasami. I have already referred to her statement before the Magistrate (Exhibit K) on the 23rd October that she saw Aiyasami standing by the head of his wife holding the *aruval*. A month after, before the Sub-Divisional Magistrate she said that he was sitting on the cot on the right side cutting the deceased with the *aruval* (Exhibit BB) and in the course of this trial she said practically the same, that he was hacking her (Court Witness No. 5). No attempt has been made before me to explain this remarkable development. Aiyasami's evidence is to this effect. He woke up that night on hearing his wife cry out, 'Ayya don't touch me, leave me alone.' His father, the appellant, Kanthimathi, Thanga Babu, the other sons of the appellant, and servants of the latter were there. He remonstrated with them for interfering with his wife. Some of the servants under his father's directions removed him to another compartment, tied him up to a pillar with a cloth, his hands were put behind him, and a cloth tied round his wrists. About 5 or 6 *naligais* afterwards his father with Pichiappa Thevan and certain others came back. He was released, and they said that when his father beat his wife, it hit her on the temple, and she died. They promised him his share of the property and something in addition, and asked him to consent to the cremation of the body. He refused.

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While they were going on like this Muttachi, and his paternal uncle, Sami Thevan, arrived. His uncle was very much distressed, told him he was wrong in having come there for the sake of his property, and told him that he might have lived elsewhere with his wife and children. He told his uncle what transpired. His father then came up, took his uncle aside, and after a short while, his uncle told him in effect that the past is beyond recall, cannot be helped, and advised him accordingly to obey his father who will give him all he wanted: he again refused. His father then made him change the cloth he was wearing for another red one Several persons came there to whom his father said: 'this mad fellow has killed his wife, and he replied 'I have been quiet for 5 or 6 years—it is my misfortune.' He was taken into the room in which his wife's dead body was only after the arrival of the Magistrate. He says he told the Magistrate, pointing to his father, that the latter was the murderer. He was afterwards taken into custody.

"Aiyasami's evidence must be received with the greatest caution. He has not been tried and acquitted, and it is possible if his father is acquitted he might have to stand his trial for murder. He admittedly went to bed with his wife and she is murdered. He has to give an explanation consistent with his innocence. He was charged with murder by his father and he gave no direct denial. His account of the murder the same night to Krishna Ayyar, according to the latter's evidence and his statement to the Magistrate four days later (Exhibit S), differ materially from the account now given in several particulars. He is contradicted by other witnesses, one of whom is his uncle, who brought him up and is very fond of him. The prosecution has put forward the false evidence of the approver. I have therefore to see whether this evidence is consistent with the probabilities of the case, and sufficiently corroborated.

"First, I shall refer to the position of the body. It was lying on its back across a cot and a bench to the north of it. They were lengthwise, east and west. The head was to the north and the legs extended beyond the cot, and were on a stool. The body was covered with a sheet of cloth and it was stretched straight out, with the face alone slightly inclined to the right The hair was loose and under the head. Now it is noticeable that there is no explanation forthcoming to show who placed the stool. It is impossible to believe that the deceased went to bed with the stool for her legs to rest on. There was no stool for Aiyasami. Muttachi did not see any stool and she cannot even say where Dhanam's feet were resting. It is obvious that some one in that house must have done it, and if the body was so placed after the murder, the stool also must have been

so placed at that time. Muttachi says she put the sheet over the body. According to her she cried out at the time of the murder and the others rushed in. She does not say when she covered up the body. The same person who placed the stool is probably responsible for this also The wounds were all transverse cuts above the left side of the body, on face, neck and upper part of the throat, the clotted blood was all on the left side. They were therefore inflicted by a person standing on her right while Dhanam was lying on her right side. This was not the position of the body. The bed was undisturbed and there were no marks of struggle If she was murdered in her bed some person must have held her down as she lay during the murder It is more probable however that everything was arranged as it appeared to the officials after the murder. There was more than one person engaged in her murder. I have already shown how Muttachi has improved her story against Aiyasami The wounds and the position of the body, satisfy me that her evidence is false I shall next consider whether the prosecution has proved the guilt of the appellant. The conduct of the appellant and Aiyasami first require consideration.

"We start with the fact that the appellant, because it is impossible to believe that Aiyasami would have been allowed to do it, interfered with the body, and that he put pressure on Muttachi to give evidence against Aiyasami. She would not willingly or voluntarily have given evidence against her grandson I think it is also proved that the appellant did not give any information to the village munsif or the police, and that he gave false information to others as to the cause of death The village munsif stated in his report that Muthusami Pillai was his first informant, and Muthusami states that he informed the village munsif of the occurrence of his own accord He stated on one occasion that he did not believe that Aiyasami was the murderer, and so wanted the truth to be ascertained. I cannot help thinking that he may have been influenced by the fact that the village munsif was very much interested in Aiyasami and likely to help him. There is also no doubt that the brothers of the deceased were informed that she died of cholera (see Prosecution Witness No 7, Prosecution Witness No. 8, Prosecution Witness No. 13 and Prosecution Witness No 14, and that persons who would probably have gone there stayed away on account of the information of death by cholera (Prosecution Witness No 9 and Prosecution Witness No. 10) This lends strong support to the evidence of Aiyasami that his consent was asked to the cremation of the body. His statement receives confirmation from that of Saminatha Pillai, who was an accountant under the appellant and

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wrote the earliest reports (Exhibits C and C 1) according to whom the appellant, the village munsif, and Pichiappa Thevan talked about burning the body. No reason is suggested to disbelieve this witness Dissemination of false information of death by cholera is inexplicable without the intention of cremation to destroy the evidence of the falsity of such information. I do not attach any weight to denial of any talk on the subject by the village munsif and Pichiappa Thevan. This attempt to cremate the corpse is of course strong evidence of the guilt of the appellant.

"Again, what is it the appellant did when, according to him, he heard the cry of Muttachi. If the evidence of Kathiresan (Exhibit J) and Muttachi's own subsequent statements that she cried out that Aiyasami was killing are to be believed, then his conduct in not rushing at once to the *kudam* requires explanation and his allegation that he thought thieves had come is false. In any event his anxiety in Exhibit F to show that he went there only after the others is suspicious; though he was not a witness to the murder, he does not hesitate to accuse his son as the sole murderer, though his own agent Muthusami Pillai and the Magistrate were not satisfied of it. As against Aiyasami's evidence the appellant's pleader relies strongly upon the statements in Exhibit S, and his alleged silence when *accused* of murder. As to Exhibit S, I am satisfied those statements cannot be relied upon to contradict his present evidence. Aiyasami was arrested on the 23rd on a charge of murder. He was not going to make any confession. The Magistrate is entitled to ask the accused to explain any incriminating circumstance. But the Magistrate did not wish to do anything himself. The police brought him up to make the statement. This was not right. The Magistrate states that he came prepared to answer questions regarding the blood-stained red cloth seized from him. The answer he made was that the red cloth was his, that he was wearing it when his father was cutting his wife and that then the blood spurted on that cloth. This is obviously false, because it is clearly proved by the village munsif and Saminatha Pillai that he was not wearing the red cloth when they saw him, and he was wearing it when the police and Tahsildar came. He could not, therefore, have been wearing it at the time of the murder. This evidence was useful to the police then to prove that Aiyasami was present at the murder. Again, his statement that he was sleeping with his head to the north was then uncalled for, except to support the police theory. It appears that he afterwards insisted upon making a further statement that he was caught and kept in restraint, and that he saw the dead body the next day with several stabs. It appears to me that Exhibit S, was made at the instigation of sub-inspector Krishna Ayyar; that the accused at that time saw no harm in the

statements about the cloth and the position of the head, and that he did so in part to put forward his own case of restraint and murder during that time. Statements made by accused persons in police custody are notoriously untrustworthy, and I am satisfied that no reliance can be placed in Exhibit S, to contradict Aiyasami's evidence.

"The defence relied a good deal on Aiyasami's conduct when charged with murder. The village munsif no doubt says that he did not say anything. But Aiyasami's own evidence is different. It has to be remembered that at that time, according to himself, he had not seen the corpse, and that the killing was represented to him to be not deliberate, and that his paternal uncle, whom he respected and loved was advising him to forget the past. It is not a matter of surprise, therefore, that he did not accuse his father of the offence of murder when surrounded by his own friends and servants. Yet his reply to what his father told his friends that 'this mad fellow has killed his wife' was an accusing reply. He said, 'I have been quiet for 5 or 6 years, it is my misfortune.' The father's charge against the son that he has been behaving improperly and his claim that the property in his hands is his own to which the son was not entitled was made 5 or 6 years ago, and the reply probably meant and is *certainly capable of meaning that if he had insisted and obtained his* share his wife would not have been killed When the Magistrate arrived, he pointed out his father as the murderer His father, the appellant, in the meantime was attempting to destroy evidence by cremating the body, to procure false evidence, as for instance, by making his sister Muttachi bear witness against her grandson, and in other ways. As I have found that Aiyasami is not the murderer, it is unnecessary to consider the evidence adduced about his unsoundness of mind and possibility of an attack of homicidal mania. There is no evidence that he had such an attack then The evidence of the village munsif and Muthusami Pillai disprove it. The evidence as to insanity is worthless, except that of the Sub-Magistrate who proves that Aiyasami was brought to him for treatment But this was shortly before the appellant's notice and petition in which he charged Aiyasami with being insane and was no doubt preliminary to it I attach no value to it I think it unnecessary to refer to all the other points raised I think the story told by Aiyasami is sufficiently corroborated It rings true The conversation with his uncle sounds natural, and agreeing generally with BAKEWELL, J, I find the appellant guilty of the offence of which he has been convicted As to the sentence I have carefully considered whether on account of the contrary opinion of one of my learned colleagues, and the length of time that has elapsed I should inflict

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the sentence of death. Giving full weight to these consideration I am satisfied that any sentence less than death will not meet the ends of justice. I accordingly confirm the conviction and sentence and dismiss the appeal."

On this appeal.

Special leave to appeal to His Majesty in Council was granted to the appellant on 16th December 1912.

SIR *R. Finlay, K.C.*, *Arthur Grey* and Dr. *Swaminadhan* for the appellant contended that under the circumstances of the case the conviction of the appellant was improper, and contrary to natural justice, and that, apart from the evidence of the approver and Aiyasami, both of whom had been disbelieved, there was no reliable evidence on which he could properly be convicted. The Court should not act on the evidence of an approver unless it is corroborated, and section 133 of the Evidence Act (I of 1872) was referred to. [Sir JOHN EDGE referred to *Queen-Empress* v. *Gobardhan*(1), and Lord PARKER to *Reg.* v. *Malápá bin Kapaná*(2), from "Law of Evidence" (Ameer Ali and Woodroffe) fourth edition, pages 716 and 717. *Sir Erle Richards, K.C.*, said he could not rely on the evidence of the approver in view of what the High Court had held in rejecting the approver's evidence; and Lord ATKINSON referred to section 288 of the Criminal Procedure Code (Act V of 1898).] Then as to the evidence of Aiyasami reference was made to the Criminal Procedure Code, section 342. His later evidence differed entirely from the statements he made when first arrested It was not relied on by any of the Judges of the High Court. BAKEWELL, J., said "Aiyasami's evidence is at least coloured by that of the approver . . . The Judge and assessors who heard and saw the witnesses are much more competent to express an opinion upon their evidence than we who have only the printed record before us. This last remark applies with special force to the evidence of Aiyasami." SADASIVA AYYAR, J, said "I think it is useless to elaborately detail all the improbabilities and inconsistencies in the different stories told by Aiyasami and the approver: it is only necessary to say that I entirely agree with the Sessions Judge that their evidence cannot be acted upon to any extent." And SANKARAN NAIR, J, said "Aiyasami's evidence must be received with the greatest caution. He has not been tried and acquitted, and it is possible, if his

(1) (1887) I.L.R., 9 All., 528. (2) (1874) 11 Bom. H.C.R., 196.

father is acquitted he might have to stand his trial for murder. He has to give an explanation of the murder consistent with his innocence. He was charged with the murder by his father and gave no direct denial. His account of the murder the same night, according to Krishna Ayyar, and his statement to the Magistrate four days later, differ materially from the account now given in several particulars. He is contradicted by other witnesses, one of whom is his uncle who brought him up and is very fond of him. The prosecution has put forward the false evidence of the approver." Both the convicting Judges of the High Court have erred in proceeding upon the assumption that either Aiyasami or the appellant was guilty and that a finding in favour of the former involved the conviction of the latter. That, it was submitted, was not the case. The only judgment really dealing with the evidence in a proper manner is that which acquits the appellant. The other judgments were full of assumption, did not deal with the actual facts of the case, and seem made up to fit in with a preconceived opinion, rather than forming an opinion from the actual evidence given. The Judges of the High Court who have confirmed his conviction have placed on the appellant the burden of proving Aiyasami's guilt in a proceeding in which satisfactory proof was impossible, and they are wrong in having done so. The evidence, it was submitted against the appellant failed, and he was entitled to an acquittal as was found by one of the assessors at the trial, and by one of the Judges of the High Court. In any case, the appellant should not have been sentenced to the death penalty on a conviction resting not on reliable evidence but on conjectural grounds, and dissented from by one of the Judges who heard his appeal: and to carry out the sentence would involve a grave miscarriage of justice.

Sir *Erle Richards, K.C.*, *Kenworthy Brown* and *E R Osborne* for the Crown first dealt with the practice of the Board in admitting appeals in criminal cases which had hitherto been very strict [Lord ATKINSON referred to the case of *In re Dillet*(1) which was cited on the application for special leave]. That is no doubt the general rule. In this case there were, it was submitted, no such grounds as would bring the case within that rule; there had

(1) (1887) L.R., 12 A.C., 459

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here been "no disregard of the forms of legal process, or any violation of the principles of natural justice by which substantial and grave injustice has been done." There was too a danger that the grant of special leave in a case like this might form a precedent for future cases without there being any substantial ground for granting leave to appeal. [Sir SAMUEL GRIFFITHS referred to *Makin* v. *Attorney-General for New South Wales*(1).] The jurisdiction of this Board was not questioned, because, of course, the King can grant an appeal in any case, but it was submitted that it was possible that the appeal in this case had been granted contrary to the legal precedents, and the practice of this Board. There had always been a reluctance to grant appeals in criminal cases, or to disturb the verdicts of Criminal Courts arrived at on the evidence. Reference was made to *The Falkland Islands Company* v. *The Queen*(2), *Reg.* v. *Bertrand*(3), per Sir JOHN COLERIDGE and the cases there referred to. [Sir SAMUEL GRIFFITHS referred to page 534 of the report in *Reg.* v. *Bertrand*(3).] See at the top of page 535 of the report: *In re Dillet*(4) per Lord WATSON, *Petition of McCrea*(5), *Ex-parte Carew*(6), re-affirming *In re Dillet*(4) and *Tshingumuzi* v. *Attorney-General of Natal*(7). The amount of credit to be given to the evidence was a question of fact to be left to the Court below. No opening should be left which might make this case a precedent for admitting an appeal in a criminal case which would not otherwise have been admitted. With reference to section 167 of the Evidence Act (I of 1872) was there independent evidence on which the conviction could be upheld? The evidence was discussed and commented on, it being contended that there was reliable evidence (exclusive of that of the approver) on which this Board could come to the conclusion that the conviction was right. Evidence was not to be wholly rejected because parts of it may be embroidered or exaggerated. Section 2[0]9 of the Criminal Procedure Code as to the Court's discretion to discharge an accused person was referred to.

Counsel for the appellant was not called upon to reply.

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(1) (1894) L.R., A.C., 57. (2) (1863) 1 Moore's P.C. (N.S.), 299 at p. 312.
(3) (1867) L.R., 1 P.C., 520 at pp. 528 and 534.
(4) (1887) L.R., 12 A.C., 459 at pp. 460, 461 and 467.
(5) (1893) I.L.R., 15 All., 173; L.R., 20 I.A., 90.
(6) (1897) L.R., A.C., 719. (7) (1908) L.R., A.C., 248 at p. 250.

Their Lordships intimated at the close of the argument that the appeal would be allowed, and that the reasons for their report would be given later.

Sir *R. Finlay, K.C.*, asked for costs. [Lord ATKINSON said, referring to *Johnson* v. *Rex*(1), that their Lordships were of opinion that the application should not be granted.]

The reasons for their Lordships' report were delivered by

LORD ATKINSON.

Lord ATKINSON.—The appellant in this case was, by the Additional Sessions Judge of Tanjore, convicted on the 1st of April 1912 of the abetment of the murder of his daughter-in-law named Dhanam, wife of his son Aiyasami, and was sentenced to death. By two orders of the High Court of Judicature at Madras, dated respectively the 19th of June and 5th of August 1912, this conviction and sentence was confirmed. The two Judges of the High Court before whom the conviction came for confirmation, namely, BAKEWELL and SADASIVA AYYAR, JJ., differed in opinion The case was then, under the 378th section of the Code of Criminal Procedure, referred to a third Judge, SANKARAN NAIR, J., and these orders are practically the orders of BAKEWELL, J , and the last-named Judge. This appeal has been taken from these latter orders In the view which their Lordships take of the case it will be quite unnecessary to deal with many of the topics discussed at great length both in the Court of the Sessions Judge and the High Court. For instance, many witnesses were examined to prove that the appellant had some motive to procure the murder of his daughter-in-law which, however inadequate to tempt ordinary human beings to commit such a crime, was quite sufficient to tempt a person such as the appellant, with his views, opinions and passions, to commit it. The motive suggested was in the main this, that the son was greatly under the influence of his wife, the stronger character of the two, and was by her instigated to insist on her husband's right to the partition of certain lands between the members of the family, on the ground that they were the property of a joint Hindu family, while the appellant insisted that he had himself acquired them

A minor and subsidiary motive was also suggested, which consisted in this that the father gave an asylum in his house

(1) (1904) A.C., 817 at p. 824

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to a daughter named Thanga Babu—a child widow as she was styled, that is, a girl who had married when she was only ten years' old and lost her husband by death before they had ever lived together as man and wife. Unfortunately this woman had lapsed, or was alleged to have lapsed, from virtue, and the deceased woman, considering apparently that the reputation of the family would be compromised by the presence of the erring one in her father's home, refused to live there unless the sinner was compelled to leave. In order to satisfy these scruples the appellant had sent this woman away, but permitted her to return to him. It was *proved that this action caused, as was but natural, feelings* of hostility and illwill to be entertained towards the deceased by Thanga Babu Both the Sessions Judge and the Judges of the High Court appear to have thought that these facts might well have furnished the appellant with a motive not only strong enough to lead him to procure the murder of his daughter-in-law, but of such overmastering force as to embolden him to run the risk of killing her in the open reckless manner suggested in the case, in the presence, and with the aid, of four or five accessories, in whose power he would thus absolutely put himself. These learned Judges, it was urged, are well acquainted with, and are the best Judges of, the habits, opinions, and feelings of the race and class to which the appellant and his family belong, as well as of those in the midst of whom they lived. However this may be, their Lordships think it safer, on the whole, to accept, for the purposes of this appeal, the *conclusion at which they have arrived on this point.* If, however, motive impels so irresistibly persons such as these to the commission of serious crime, it is difficult to see why the enmity existing between Thanga Babu and the deceased, caused as it was, might not also have moved this insulted woman to procure, or aid in, the removal of her enemy by foul means. But however these things may be, and however strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice its use may lead to, nor by itself supply the want of all reliable evidence, direct or circumstantial, of the commission of the crime with which an accused person may be charged.

Their Lordships desire to abstain, as far as possible, from expressing any opinion upon either the guilt or innocence of any of the persons who have been accused of aiding in this murder, or upon the credibility of any witness who was not a witness against the appellant Their task is to determine whether in the prosecution of the appellant—to use the words of Lord WATSON when delivering the judgment of this Board in *In re Dillet*(1), "by some disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done." If they come to the conclusion that injustice of that kind has been done, then whatever doubts they may have of the appellant's innocence, or whatever suspicions they may entertain of his guilt, or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters, they think they are bound humbly to advise His Majesty that the conviction should not be allowed to stand.

Their Lordships have come to the conclusion that injustice of the kind mentioned has in this case been done, mainly owing to this, that a vast body of wholly inadmissible evidence, hearsay and other, has been admitted; that when admitted it has been used to the grave prejudice of the accused, and that at the end of the hearing before the Judge of First Instance there did not exist any reliable evidence upon which a capital conviction could be safely or justly based. The fact that their Lordships found their judgment on these points relieves them from the necessity of examining in detail any portions of the voluminous evidence not directly bearing upon them.

The appellant is a wealthy and apparently respectable landholder of good position, living at the village of Pandi, in the Tanjore district of Madras Aiyasami is the son of his third wife. He was brought up by his paternal uncle, one Sami Thevan, a village munsif, and was at the time of the trial about 25 or 26 years of age He is described by the Sessions Judge as dull and weak-minded, and an effort was made to show that from his temperament and character, as well as from some past exhibitions of unprovoked and unreasoning violence, he was a man likely to have an attack of homicidal mania. His wife, the deceased woman, was also a member of a respectable family.

(1) (1887) L R, 12 A.C., 459.

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She was apparently a resolute and clever woman, about 22 years of age, and had acquired considerable ascendancy over her husband. There were two children of the marriage, both alive, and aged respectively about four and one and a half years. For six or seven years previous to the year 1911 he and she had been living with her relatives in a village in the neighbourhood of Pandi. The father and the son were upon bad terms. At length, by the intervention of friends, a reconciliation was to some extent effected, and Aiyasami, his wife, and two children went on the 13th of September 1911 *to reside in the appellant's* house, to see, it was stated, whether they would get on together; one of the terms, however, insisted upon by them was that *Thanga Babu should not be permitted to reside* in her father's house. It is not disputed that Aiyasami and his wife retired together to rest on the night of the 22nd of October in their father's house, and that she was, during the night and before dawn, murdered with the most brutal and savage ferocity. Thirteen wounds were found to have been inflicted upon her body, all upon the left side, some few slight, but most of them very severe, and many such as could only have been inflicted with some sharp instrument used with very great force. For instance, wound No. 2 was an incised wound an inch long, half an inch wide, and half an inch deep over the left temple. Another, No. 3, a quarter of an inch long, one-eighth inch wide, one-eighth inch deep just behind the left ear, the lobe of the ear being cut off. No. 4, a cut three inches long, half an inch wide, and half an inch deep on the upper part of the neck on the left side, dividing the local blood-vessels in its course. No. 6, a transverse cut three inches long and half an inch wide, extending down to the bone on the left side on the lower jaw, and five or six other wounds of almost equal severity. Such a wound as No. 4 would, according to the evidence of Colonel Hasell Wright, an Army medical officer, examined as a witness, have probably rendered the woman unconscious and unable to talk or walk, as also probably would have wound No. 9. Wound No. 1 would, he thought, probably have stunned her if caused by the weapon called an *aruval*, or bill hook then shown to him, and the fact that the wounds were all transverse would point, in his opinion, to their having been inflicted by one man in the light, not by two men in the dark, while the absence of wounds on the hands of the deceased would

indicate that the woman was murdered in her sleep rather than while struggling to protect herself.

On the 23rd of October 1911, the day after the murder, an inquest was held upon her body and a verdict returned by the jury that Aiyasami Pillai, her husband, had murdered her with a blood-stained *arival* then produced to them. This weapon had been found in the place where the deceased woman had slept, had been taken possession of by the police, and was produced at the inquest. On the 22nd of November 1911, Aiyasami Pillai was brought before the Second-class Magistrate at Tirutturaipundi in the Tanjore district, charged with the murder of his wife, with the view apparently of his being returned for trial for the crime. The depositions of several witnesses, including that of an old woman, Mutachi, his grandmother, then an inmate of the house, were taken. She deposed that during the night she heard a noise like a thud, got up, went to where Aiyasami was sleeping, found him sitting on a cot on the right side of the bed and cutting his wife with an *arival*, that she said to him "Boy, what do you cut?" and cried out, "He has killed, he has killed," that the baby then sleeping in the cot woke up, and that there was blood but no wounds upon it. The magistrate, instead of returning the accused for trial, stated he disbelieved the evidence against him, admitted him to bail, and next day, the 28th, discharged him from custody. In delivering judgment he said, "The defence theory is not completely before me. It goes to show that the deceased was obnoxious to the accused Thanga Babu, and she, Thanga Babu, decoyed her into the cattle shed, or backyard, and gave her into the hands of the accused's father and satellites, who brutally killed her, and laid her out in her bed and forcibly put a bloody cloth on the accused and accused him of murder" According to the defence the murder took place about midnight. The magistrate wound up by saying that "All these circumstances point the suspicion against the accused's father, step-sister, step-brother Kalyanam, the servant Kathiresan and others. This will be further investigated." Aiyasami was the only person who had been charged. There is no proof that the defence to which the magistrate refers as put forward on his behalf was not put forward at his instigation or with his concurrence. It differs in every particular from the account subsequently deposed to by him This

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magistrate had no doubt jurisdiction to take the course he actually took, but the discharge is not an acquittal. Aiyasami might have been tried again; he, to use the words of the Sessional Judge, "was not safe," at the time of the subsequent trial, and one of the results of his discharge under the circumstances was necessarily this, that he was subjected up to and during the trial to a tremendous temptation to endeavour to put the halter round his father's neck in order to save his own. That circumstance can never be lost sight of in estimating the value to be attached to the evidence he subsequently gave.

On 27th November, the day previous to the delivery of this pronouncement, this same magistrate had ordered the arrest of Thanga Babu, Kathiresan, the appellant's servant, and Kalyanam, his son.

On the 2nd of December the appellant's wife, Kanthimati Achi, and Avani Konan were also arrested. Ultimately every inmate of the appellant's house was arrested, with the consequence that their mouths were closed, since, though accused persons may make a statement, and the judge or magistrate may put questions to them, they cannot be examined as witnesses on their own behalf. On the 27th October the Second-class Magistrate of Tiruturaipundi took from Aiyasami a statement, not on oath, which was ultimately put in evidence by the prosecuting counsel at the trial in corroboration, it was said, of the former's evidence, although it is in many respects inconsistent with it. It is printed at page 115 of the record. In it he states that he, his son (the baby), and his wife, the deceased, had gone to bed, that his wife lay with her head northwards, the *child in the middle, and he on the eastern side*; that Kanthimati Achi, the wife of the accused, Thanga Babu, his sister, and Kalyanam, his brother, were pressing down his wife; that his father, the appellant, cut her with one stroke; that he went near *his father and said "Don't cut, leave off,"* and that the blood spurted on a red cloth he was wearing at the time, and stained it; that his father and brother Kalyanam said: "You catch hold of that fellow, and keep him," that thereupon the two servants Kathiresan and Avani, and one Somu, the son of an employee or agent of the appellant, caught hold of him and kept him; that 10 or 15 minutes after he was caught hold of and thus kept, they all came out to where he was; that while

he was kept under restraint the noise continued to be heard, and that at dawn he went and saw that other cuts had been inflicted on his wife. This, having regard to what followed, is in many respects a most important statement. First, it was proved in the case and was admitted in argument before their Lordships that the statement that at the time his wife was murdered he was wearing this red loin cloth was untrue. It was proved to be his cloth, but it was also proved that the cloth he wore the night his wife was murdered was a white cloth. Secondly, he does not state that a man Thiagan was present on the occasion of the murder or took any part in the proceedings. Thirdly, he made no suggestion that his wife was removed from the room where she lay before she was killed On the contrary, the fair meaning of his words would rather appear to be that she was murdered where she lay. Well, on the 6th of December 1911, this Thiagan was arrested by, as appears from Exhibit G, page 143, Detective-Inspector D. S. Krishnaswami Aiyar, and next day brought before this same magistrate He was kept in custody, and on the 28th of that month the magistrate writes to his superior officer J. T. Gillespie, Exhibit 23, page 170, to announce that Thiagan had made a full confession implicating the appellant and the other prisoners, corroborating the evidence given by Saminatha Pillai in the previous enquiry, and implicating the informant himself. On the 14th of December following a statement was taken from this man by V. S. Narayana Rao, a Second-class Magistrate, and he was subsequently, on the 8th of March 1912, examined as a witness at the trial The story told in the confession is strange and revolting. He brings upon the scene his brother Somu as well as himself, all or almost all of the inmates of the appellant's household, and two unnamed strangers unknown to him. He represents that he himself, his brother Somu, Kathiresan, and Avani, the two servants, by the orders of the appellant took away Aiyasami to a second compartment and tied him there, Avani being left in charge with directions, given by the appellant, to hack him if he talked That Somu, Kathiresan, and himself then returned to where deceased was, that the appellant's wife Kanthimati pressed down the shoulders of the deceased, that Kalyanam, the son, closed her mouth, that by the appellant's directions Kalyanam and Kathiresan lifted the woman by the head side,

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he and Somu by the feet, and, conducted by the appellant, and followed, with a light, by Thanga Babu, carried her into the cow-shed, and laid her down at the foot of an orange tree; that the two unknown men were standing there; that the appellant then said to these men "Do your business," that thereupon one of them, coming to the right side, cut the deceased between the ear and the right shoulder with an *aruval*, that the appellant then addressed these nameless men, saying, "You men despatch the business soon," and thereupon the men proceeded to hack the deceased to death, that subsequently the appellant said to him, "There is a dyed cloth; take it. Aiyasami is now wearing on his waist a white cloth; take it off and dress him with this dyed cloth," and that he, Thiagan, subsequently did so. This last statement, it will be observed, is in direct contradiction to the statement made by Aiyasami on the 27th of October, already referred to, who, when asked to explain how blood-stains had got on the red dyed loin cloth taken from him, replied that when his father (the appellant) cut the deceased with one stroke her blood spurted out upon it.

This man was on the 18th of March examined as a witness. He stated he did not see the appellant on the night of the murder, that he did not go to his house that night, that Mutachi had told him Aiyasami had cut his wife, and that he did not see any *one cutting* her. He was thereupon, *by the permission of the* Court, cross-examined by the Public Prosecutor.

The cross-examination ran as follows :—

(By permission of Court, cross-examined by Public Prosecutor.)

Q. Were you examined by the Nidamangalam Sub-Magistrate?

A. Yes

Q Did he record what you said?

A I deposed before him as I was tutored by the Police

Q Did you tell him that?

A. I was asked by the Police not to say so.

Q Did you tell t e Magistrate the truth?

A. I told him what the Police told me.

Q Was it the truth?

A. The only truth is what I have said Mutachi told.

Q Did you tell the Sub-Magistrate what Mutachi told you?

A. I did not, as I was asked by the Police not to say so.

Q Everything that you told the Sub-Magistrate was false?

A. I told him what I was asked to say. I was asked to speak falsely and I spoke falsely.

These being his replies, his confession (Exhibit O) was read over and filed as evidence. Next day, on being brought into Court, still in custody, he volunteered that on the day before, when he saw the Court and people, he was afraid, and that he now wished to speak the truth. But he was never asked, either by the Court or Counsel on either side, to name the officer or officers of the Police who asked him to give false evidence. The officer who arrested him was not produced, nor was any witness produced by whose cross-examination the defence would have had an opportunity of ascertaining at whose instance he was arrested, or how this confession came to be made, or what inducements, if any, were held out to him to make it. Everything connected with it was, as far as the appellant was concerned, done in the dark. And Sir *Robert Finlay*, who opened this appeal, complained bitterly, and, in their Lordships' view, not without reason, of the great injustice done to the accused by the adoption of such a course of procedure. The Sessions Judge most naturally and rightly came to the conclusion (p. 188) that it would be unsafe to accept any portion of the approver's story without independent corroboration. Mr. Justice BAKEWELL thought that no reliance could be placed upon it. And the third learned Judge who heard the case said (p. 233) that the informer's evidence was not relied upon before him. Sir *Erle Richards*, quite rightly, in their Lordships' view, early in the argument, stated he did not intend to rely upon it. This evidence may therefore be taken as struck out of the Record, but though struck out, it leaves its taint behind it, and reflects back upon the evidence of Aiyasami, the only other witness who gives direct testimony as to the commission of the crime by the appellant, for this, amongst other reasons, that on the 18th of January 1912, three weeks after the informer's confession had been taken, Aiyasami had himself made a deposition, evidently designed and intended to corroborate the informer's story. In it he brings upon the scene the informer, whom before that he had never mentioned as having been present.

The statement that the informer had tied the red cloth round him after all was over conforms with the latter's story though it is in conflict with his own previous account, and the further statement

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that he had been tied to a pillar, never made before, was obviously introduced for the same purpose. The stories told by both these men are thus designedly made to harmonize and fit into each other. When one story is rejected as incredible the reliability of the other is necessarily affected. He (Aiyasami) was examined as a witness at the trial on the 21st March 1912. He then stated that his statement given to the Magistrate G. S. Vaithinatha Ayyar on the 27th of October 1911 was not true; that the Inspector Krishna Ayyar "troubled" him to make it, that he saw this Inspector in the gaol seven or eight times before he made it. In cross-examination he said that he told the Magistrate he lay with his head to the north, because the Sub-Inspector told him to say so; that the Sub-Inspector said it would be a good thing for him to say that, but that he did not mention why, that it was not true that he was lying on the east side of his wife. He further said it was false that his father cut his wife with one stroke, that the Inspector told him to say so, that he told the Sub-Magistrate that he had omitted the name of the informer in his statement made on the 27th of October 1911 (Exhibit S) because the Sub-Inspector had asked him to do so, that he had told the Magistrate that the Sub-Inspector had told him to suppress Thiagan's name, but did not ask him to suppress Somu's name. He further stated that it was the Sub-Inspector who told him to say that he saw his father cut his wife, and also to say that the murder was on the cot in the room. He admitted that he had denied to the Sub-Magistrate the statement that the Sub-Inspector had told him to mention the name of the person who killed his wife, but that he did this at the dictation of the Sub-Inspector. Several charges of less importance were made by the witness against this Sub-Inspector and this Sub-Magistrate. These latter were examined as witnesses and denied them all. If true they show that these officials or at least the Sub-Inspector induced the witness to forswear himself, and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father, and, if false, they show that the witness was ready to commit, and did commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements.

There is no alternative. Forgetfulness is, their Lordships think, out of the question, and no confusion produced by the

most skilful cross-examination can account for statements which must either be the witness's own inventions, or the inventions of others repeated by him with knowledge of their character. In either event their Lordships are clearly of opinion that this witness's evidence is wholly unreliable, and should be disregarded as completely as that of the informer.

The learned Sessions Judge appears himself to have taken a similar view of this man's evidence, at least to a large extent. When referring to it, at page 188, he said —" But though I do not wish to apply a meticulous standard to his evidence, I do not think it will bear the test of examination." And so fully does he appear to have been convinced of this that he acquitted and ordered to be discharged three of the persons whom Aiyasami had expressly charged with being active aiders and abettors in the murder.

Sir *Erle Richards* urged upon their Lordships the danger of disturbing the verdicts of Judges in criminal courts in India, who, having seen and heard the witnesses, had believed them, and founded their decisions upon their testimony. Their Lordships are fully alive to those considerations. But this is emphatically not a case of that character. It is precisely the reverse of that. Here the Judge who heard and saw the witness did not think his evidence so reliable that he could act upon it alone.

If he had thought it reliable he could not have ordered the discharge of the three prisoners implicated by it His statement is very explicit (page 200) " I do not think that there is sufficient evidence to establish beyond doubt how or where the murder was actually committed, or that either Kathiresan or Avani or *Thanga Babu assisted in it, though it is highly probable that* the former were amongst the agents employed by the first accused. I therefore acquit them and discharge them."

The learned Sessions Judge based his conviction of the appellant on five specific findings, as he styles them. These are all stated by him at bottom of page 199, and top of page 200 of the Record, and are as follows: (1) That the murder must have been committed by some of the inmates of the appellant's house that night. (2) That the clothes, *i.e.*, the two loin cloths which were spotted with blood, afforded conclusive proof that more than one man assisted in the murder. (3) That the account given by the appellant and his mother-in-law (*i.e.*, Mutachi) were

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demonstrably inconsistent with facts. (4) That the appellant's conduct after the murder indicated a guilty conscience. (5) That he was the only one of the inmates of the house who is proved to have had any motive to murder Dhanam.

Their Lordships do not think that this last conclusion necessarily follows from the evidence. As to the first, if the learned Sessions Judge had said that the murder must have been committed either by or with the connivance or assistance of some of the inmates of the appellant's house, their Lordships would be inclined to concur with him. The second finding is, they think, a *non-sequitur*. It assumes that the two cloths, both of which belonged to Aiyasami, could not have been worn by him at two different stages in this outrage, and must at the time of the murder have been worn by two different men. But Aiyasami never said so; on the contrary he first stated he had worn the red one at the time of the murder, and that his wife's blood spurted on to it when his father cut her with one stroke. Then he swore that he wore the white cloth on that night, and that the red one was put on him by the approver by his father's directions. This theory is in direct variance with every one of Aiyasami's statements. If the cloth not worn at the time the murder was committed was in the compartment where the deceased and her husband slept it may well have got her blood upon it, much of which must have been shed. If he changed his clothes after the murder the second might well have got stained in this room. There is no evidence where the clothes not in use were kept. If in the room where the murder was committed they might well have been stained with spots of blood as they have been found to be, and, besides, spots of blood might have got on one of them from other sources. Moreover the proof, as is usual in such cases, only established that the blood was mammalian blood.

As to the third finding their Lordships would quite concur with the Sessions Judge if it is to be assumed that the story told by the informer and Aiyasami is true, but they fail to find anything in these accounts to show they are demonstrably inconsistent with the facts on any other assumption. The fourth finding opens up a wide field. A large body of inadmissible evidence, hearsay and other, was admitted, some unimportant in bearing and effect some very prejudicial to the accused. Statements made in the absence of all the accused, such as the

conversation between Sami Tevan and Aiyasami, in which the latter was urged to say nothing about the murder and to compromise with his father, and statements made in the absence of some of the accused but in the presence of others were lumped together and fused, *in globo*, apparently, against all. But this finding is based in the main upon a piece of evidence which was utterly inadmissible, and which, when admitted, was pressed home by the prosecution against the accused with great effect, and, as is evident from the judgments, wrought the greatest injustice. It is this, messengers were sent not by the accused, but by a friend, to announce the death of the deceased to some friends and acquaintances of the family in another village. These messengers told some persons to whom they spoke that the deceased woman had died of cholera. The rumour spread The person who sent the messengers was sworn and examined. He denied that he had ever instructed them to make such a statement. Not a particle of evidence was adduced to show that the appellant had himself instructed these messengers to make this statement, or directly or indirectly ever authorised anyone to make it for him or on his behalf or that he knew anything about it Yet, without the foundation for admitting these statements ever having been laid, they were admitted in evidence, and because the bodies of persons who die of cholera in India are almost immediately cremated to avoid the spread of infection, were relied upon by the prosecution and accepted by some of the Judges who considered this case, as clear and convincing proofs of the appellant's consciousness of guilt, and of his desire (in one instance it is styled an attempt) to destroy the evidence of his crime.

It appears to their Lordships that a grave and substantial injustice was done to the appellant in admitting and thus using this piece of inadmissible evidence The two other matters relied upon as proofs of the accused's guilty conscience are first a conversation about the cremation of the remains, the ordinary way of disposing of the bodies of dead Hindus in India, which was perfectly innocent on its face, and may well have had reference to nothing more than the funeral which was to take place in due course. The rumour of the death by cholera was permitted to reflect back, however, on this simple incident, and in the eyes of the Sessions Judge gave to it a guilty complexion. In their Lordships' view this piece of evidence gives no support whatever to the fourth finding. The other incident relied upon to support the finding

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is this: Sami Tevan, the village munsif, who entertained no friendly feeling towards the appellant, was sent for before 6 o'clock in the morning. He arrived at the appellant's house about 6 A.M. He was shown the body of the deceased, saw Aiyasami and took a statement from the appellant, and gave it to the police five or six days later, but the police were not communicated with for some hours, and did not arrive on the scene till about 11 o'clock. It was contended that the room in which, the deceased slept had by that time been arranged, and the body of the deceased placed in a position it could not have occupied at the time of the murder. This may well be, but many people had access to the room as well as the appellant.

There is no evidence that he himself did, or procured to be done to the body any of these things. The matter specially pressed against him is the tardiness of the communication with the police. Their Lordships think that in this case that is rather a negative circumstance. Whether the father himself committed the murder or the son committed it, eagerness to communicate with the police could not well be expected from him. The following passage from the judgment of the Sessions Judge deserves attention. It runs thus (p. 200). "On these findings (the five preceding) I convict first accused (*i.e.*, the appellant), Vaithianatha Pillai, of abetment of murder punishable under section 302 read with either 109 or 114, Indian Penal Code, since he is said to be physically incapable of having inflicted the injuries with his own hand." Colonel Wright had deposed that wound No. 4 would probably have rendered the woman unconscious, that it might have been inflicted with a weapon such as the *aruval* shown to him, but that he had examined the appellant, that he had a badly united fracture of the bone of the right fore-arm, and that his hand was more or less deformed, and that, considering the state of his right arm, he could not have inflicted this wound.

What their Lordships presume the learned Sessions Judge meant by this paragraph is this, that the appellant did not himself inflict the blows, but, of course, if the case against him has any truth in it, he was a principal.

The facts so found by the Sessions Judge furnish in his view the corroboration of the evidence of Aiyasami which rendered it reliable as against his father, though unreliable against the other three persons accused. In their Lordships' view, the inferences

which the Sessions Judge has drawn from the evidence and embodied in these findings cannot reasonably be drawn from it. They think that the evidence reasonably interpreted affords no corroboration at all of Aiyasami's story. The so-called circumstantial evidence in their opinion in no way strengthens the direct evidence, which, as already stated, cannot be relied upon, and for these with the other reasons already mentioned, they think that the conviction of the accused should not be allowed to stand. And they have humbly advised His Majesty accordingly.

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Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitor for the Crown: *The Solicitor, India Office.*

J V W

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Sankaran Nair.

U KESAVULU NAIDU (PLAINTIFF), APPELLANT,

1912. November 13 and 14.

v.

ARITHULAI AMMAL AND SIX OTHERS (DEFENDANTS 1 AND 3 TO 8), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 16, as amended by Act VI of 1899—Interest, grounds for reduction of—Undue influence.

It is not open to a court to reduce the rate of interest in a promissory note unless the stipulation as to interest was obtained by the exercise of undue influence as defined in section 16, Indian Contract Act (IX of 1872)

Balkishan Das v *Madan Lal* (1907) I.L.R., 29 All., 303, dissented from

Dhanipal Das v *Raja Maneshar Bakhsh Singh* (1906) 33 I A, 118, followed.

Per THE CHIEF JUSTICE —It was not open to the District Judge on general equitable grounds to interfere with the contract between the parties unless he was satisfied that the contract was brought about by the exercise of undue influence

Per SANKARAN NAIR, J.—Excessive interest in itself may not be a ground for relief but it may be evidence of the fact that the debtor must have been in a very helpless condition to accept the terms imposed by the creditors.

Compare the decision in *Muthukrishna Iyer* v *Sankaralingam Pillai* (1913) I.L.R., 36 Mad., 229.

APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of Chingleput in Original Suit No. 8 of 1909.

This was a suit by a transferree to recover Rs. 4,200 principal and interest due on a promissory note (Exhibit A)

* Appeal No. 90 of 1910

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executed on 12th September 1906 by defendants 1 to 5 in favour of one Parthasarathy Naidu (plaintiff's first witness) for a sum of Rs. 1,500 at the rate of 5 per cent. per mensem for the purpose of preserving Zamin Mercandai their common property from sale in execution of the decree in Original Suit No. 119 of 1903 on the file of the court of the District Munsif of Chingleput. It was stated in the plaint that the defendants received the plaint amount through their authorized agents and executed an agreement (Exhibit C) on 14th March 1906. Stating the circumstances under which they were driven to execute the suit promissory note at this rate of interest plaintiff's first witness transferred the promissory note to plaintiff on 2nd October 1907 for full consideration (Exhibit A).

Defendants 3 and 4 admitted the execution of the promissory note and the passing of the consideration. Fifth defendant was *ex parte*.

Second defendant died and her minor sons, defendants 6 to 8, were brought on record and their father appointed guardian.

First defendant and defendants 6 to 8 contended *inter alia* that the suit promissory note was not genuine and executed by defendants 1 and 2; that defendants 4 and 5 were the daughters of Seethapathy (plaintiff's fifth witness) and fifth defendant is married to third defendant's son; that defendants 1 and 2 got the estate of their father after the death of their brother by a will (Exhibit I); that defendants 1 and 2 asked Seethapathy to pay Rs. 1,158-0-3 towards the decree in Original Suit No. 119 of 1903, for the sums he owed to the estate when he was managing it during the minority of their brother; that he consented and paid the amount; that he obtained the signature of the second defendant on a piece of blank paper stating that he wanted a receipt as a voucher for the amount he paid till the settlement of the estate accounts; similarly obtained first defendant's signature on a label and the attestation of her husband representing that second defendant signed it; that on this blank piece of a paper he got the promissory note executed; that the rate of interest as provided in the promissory note was not enforceable and the bargain was an unconscionable one; that the agreement was a bogus one; that he obtained the signature of the first defendant on a blank stamp paper and got the agreement executed on it with a view to create a right in the estate property for his daughters, defendants 4 and 5.

The following issues were framed :—

I. Is the suit promissory note genuine ?

II. Is *the rate of interest provided in the suit promissory* note enforceable ?

On a consideration of the oral evidence and the probabilities the District Judge found that the suit promissory note was genuine.

On the second issue the District Judge found as follows :—

"The whole dispute in the suit has clearly arisen on account of the exorbitant rate of interest of 60 per cent. per annum. Is the Court competent to cut down the rate ? The rate provided for in the suit promissory note is less than that in Exhibit H. There is evidence to show that plaintiff's fifth witness and defendants' first witness were not successful in their attempts at raising a loan in various places. The need for the loan was to avert the sale of one of the Zamin villages. It is contended that on the security of two villages which were worth Rs. 8,000 at the time it should have been possible to raise a loan at a lower rate of interest. But there is the fact as shown in Exhibit H that in November 1905 it was not possible to get a loan at a low rate of interest. It is not shown that there are any circumstances between the dates of Exhibit H and Exhibit A to indicate that a loan could have been raised on more favourable terms. But there are other circumstances also requiring consideration. Plaintiff's fifth witness admits that subsequent to the execution of the promissory *note he made no attempt to get the decree* debt discharged or to get the suit debt discharged. All that he did was to get the promissory note transferred to the plaintiff. Even subsequent to transfer he says he took no steps as defendants 1 and 2 are at variance with him he was not bound to take any steps when disputes arose between the parties but in the peculiar circumstances of the case the fact is one of the elements to be considered. Even according to the plaintiff's evidence the suit debt was agreed to be discharged in six months. *But the suit was instituted three years afterwards.* Plaintiff's fifth witness admits that if the amount was not paid up the estate would have to be proceeded against. Taking all the circumstances into consideration, I am of opinion that the rate provided for is exorbitant and is in the nature of an unconscionable bargain. Defendants 1 and 2 were at the time under the guidance of plaintiff's fifth witness and defendants'

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first witness. There is no evidence that the husband of the first defendant took any steps in raising the loan. Defendants 4 and 5 are the daughters of plaintiff's fifth witness and the 3rd plaintiff's fifth witness and the third defendant is related to the fifth by marriage also. Under these circumstances I reduce the rate of interest up to the date of plaint to 24 per cent. per annum."

In the result he gave a decree to the plaintiff against all the defendants with costs for the amount of the promissory note with interest at 24 per cent. from the date of the promissory note to the date of plaint and subsequent interest at 6 per cent. from the date of plaint up to date of realization.

Defendants appealed to the High Court.

M. Narayanaswami Ayyar for the appellant.

T. Ramachandra Rao for the second respondent.

S. V. Padmanabha Ayyangar for respondents Nos. 5 to 7.

WHITE, C.J.

THE CHIEF JUSTICE.—This is a suit brought by the endorsee of a promissory note of Rs 1,500 which provided for the payment of interest at the rate of 60 per cent. per annum. The makers of the note were five ladies. Two issues were raised; is the note genuine? is the rate of interest provided in the note enforceable? The judge found that the note was genuine but that the rate of interest was not enforceable and in lieu of the interest provided for in the note he gave the plaintiff interest at the rate of 24 per cent. per annum. The plaintiff appeals against this. There is no cross-appeal as regards the genuineness of the note. The contesting defendants are defendants Nos. 1, 6, 7 and 8. They plead that the note was fraudulent and that the rate of interest was high and unconscionable. There is no plea that the note was procured by the exercise of undue influence on the part of anybody. There is no issue as to this and there is no finding of the District Judge as to this. Consequently, I suppose it must be taken that the District Judge, although he was not prepared to find or although at any rate he did not consider it necessary to find that the execution of the note was procured by undue influence, was of opinion that he could give relief to the defendants by way of reducing the rate of interest provided for in the note to what he considered an equitable rate in all the circumstances of the case. Now it seems to me and I speak only for myself that it was not open to the District Judge on general equitable grounds to interfere with

the contract between the parties unless he was satisfied that the contract was brought about by the exercise of undue influence. As the Judge has given the plaintiff a decree on the note it must of course be taken that the Judge did not consider that it was vitiated by fraud. In support of the contention that the learned Judge can, on general equitable grounds, interfere with the contract rate of interest, our attention has been called to several authorities. *Poma Dongra* v. *William Gillespie*(1), was cited to us. There the Court granted equitable relief on the ground that the agreement appeared to be of an unconscionable character. It would seem in that case the learned Judge (DEWAR, J.) was of opinion that the agreement was brought about by undue influence. He says "I have no doubt in my mind that, when the defendant executed the two promissory notes in this suit undertaking to repay the loans with interest at 75 and 60 per cent. per annum, the plaintiffs were in a position to dominate his will." That observation is obviously made with reference to section 16 of the Contract Act. Then we have the Allahabad decision in *Balkishan Das* v. *Madan Lal*(2) In that case the learned Judges confirmed the judgment of the District Judge reducing the rate of interest, although in that case there was the finding by the Court below which was accepted in the High Court that it was not a case in which it could be said that undue influence was brought to bear. All I can say with regard to that case is, speaking with all respect, that it seems to me to be impossible to reconcile it with the decision of the Privy Council in *Dhanipal Das* v *Raja Maneshar Bakhsh Singh*(3), a case, I think I am right in saying which was not brought to the notice of the learned Judges of the Allahabad High Court. In that case the Subordinate Judge held that it was not one of fraud or undue influence but of inequitable dealing and he decided to interfere in the enforcement of the hard terms of the contract and accordingly allowed simple interest at 18 per cent. but not compound interest In dealing with this judgment Lord DAVEY in delivering the judgment of the Privy Council said "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He

(1) (1907) I.L.R., 31 Bom, 348 at p. 352. (2) (1907) I.L.R, 29 All, 303
(3) (1906) 33 I.A, 118 at p 127.

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WHITE, C.J.

ought to have considered the terms of the amended section 16 only. He also mistook the English Law. Apart from a recent statute an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud, which is not this case. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case. But, although he was wrong in the reasons for his judgment, the Subordinate Judge may be right in his findings of fact." This, so far as I know, is the latest decision of the Privy Council with regard to this question. The principle of this decision was applied by this Court in *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar*(1). There are no doubt earlier cases of the Privy Council in which equitable relief has been granted and the rate of interest has been cut down without any finding express or implied that the agreement was brought about by undue influence. I may refer to the cases of *Srimati Kamini Soondari Chowdhrani* v. *Kali Prosunno Ghose*(2) and *Rajah Mokham Singh* v. *Rajah Rup Singh*(3). Both these cases were decided after the passing of the Indian Contract Act, 1872, and before the amendment of section 16 of the Act of 1899. The object of the amendment was to extend the scope of the section and does not affect the question we are now considering. With regard to the latter case it may be observed that the language of their Lordships is somewhat guarded. They conclude their judgment by saying " a decision thus arrived at ought not to be set aside on appeal unless it clearly appears to be wrong." *It may be that the last decision in Dhanipal Das* v. *Rajah Maneshar Bakhsh Singh*(4), is difficult to reconcile with the two earlier decisions. It seems to me, we ought to apply the principle as laid down in the latest case; and applying that principle I am of opinion that it was not open to the District Judge to reduce the rate of interest unless he was of opinion (and in the absence of any issue or finding I do not think we can assume he was of opinion), that the stipulation as to interest was procured by the exercise of undue influence as defined

(1) (1911) I.L.R., 34 Mad., 7.
(2) (1885) 12 I.A., 215.
(3) (1893) 20 I.A., 127.
(4) (1906) 33 I.A., 118.

by section 16. We have a state of things in which the District Judge has found we must take it, against the plea of fraud; because if the plea of fraud was made out, he of course would not have given the plaintiff a decree for the amount of the principal with interest at the rate which he thought was equitable. We must take it that he finds against the plea of fraud, that he finds that the document was a genuine document in the sense that it was executed by the parties by whom it purports to have been executed and that he does not find that it was brought about by undue influence. In these circumstances, I think that his judgment that the rate of interest ought to be cut down cannot be supported. Then I assume for the purposes of this appeal and only for the purposes of this appeal, that it is open to us to deal with this case as if there had been the plea of undue influence raised and to consider whether, on the evidence, the plea is established. On the evidence it seems to me clear that that plea is not established The transaction was carried out by the fifth witness for the plaintiff, who is the father of the defendants Nos. 4 and 5 and the husband of the second defendant and who acted under a power of attorney which was given to him by his own daughters and by the other defendants in the case—the executants of the note. The difficulty, about the case is, to say who is the party who exercised the domination and who is the party whose will was dominated. The fifth witness for the plaintiff, the agent, was acting under a power of attorney and there is no evidence to support the suggestion that his will was dominated in that that he entered into a transaction which he knew was inequitable or which he knew was contrary to the interests of his principals, the parties who gave him the power of attorney The ladies were very anxious to raise the money for the purposes of saving the estate from sale but there is no evidence from which we can draw the inference that their agent, brought pressure to bear upon the ladies or that they were in a position of helplessness Then can it be suggested that his will was dominated? There is no evidence to show that he entered into an agreement by which the original payee, who is the first witness for the plaintiff, agreed to advance the amount of Rs. 1,500. It is not found that this Rs. 1,500 was not advanced The original payee in turn endorsed the note to the plaintiff. It is not found that the plaintiff did not advance Rs. 1,500 to the original payee. I can find no evidence

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in the case, at any rate our attention has not been called to any, which would in my opinion, warrant us in holding that the wills of the executants of the note were dominated by anybody or that the will of their agent was dominated by anybody so as to bring in the provisions of section 16 of the Contract Act. No doubt the rate of interest is high and it may be that a very high rate of interest is not only evidence of the unconscionable nature of a bargain but is also evidence that the will of the party who consented to pay the exorbitant rate of interest was dominated. Here we have the rate of interest at 60 per cent. In the circumstances of this case it seems impossible to hold on that alone that the contract was brought about by undue influence and in my opinion there is really no other evidence in the case which would warrant us in coming to that conclusion. There is a further question that I need not discuss, *i.e.*, as to the rights of the plaintiff as the holder of the note by indorsement from the original payee. Then there is another defence put forward; so far as I understood it, it was that the payee was a mere name lender for the fifth witness for the plaintiff who held the power of attorney and that the benefit of the transaction was to be enjoyed by this fifth witness. If there was any evidence at all that there was anything like collusion or conspiracy as between the payee and the fifth witness for the plaintiff that they would be sharers of the spoils, then of course we should have to consider whether we could allow the transaction to stand. But so far as I can see there is no evidence. This defence seems to me merely a suggestion which is quite unsupported by the evidence. For these reasons I think we must allow the appeal and give the plaintiff a decree for the amount of the principal and interest at the rate provided for in the note. We modify the decree of the lower Court by substituting the rate of interest as provided for in the promissory note for the interest at 24 per cent. Interest at 6 per cent. after the date of the plaint will be allowed. The plaintiff will have costs here and in the lower Court to be paid by the first defendant and the second defendant's legal representatives.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—Under section 16 of the Indian Contract Act IX of 1872 before it was amended a contract which was entered into by one party under undue influence as defined therein was voidable by him. The following is the definition of

undue influence. "Undue influence is said to be employed in the following cases:—

(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which but for such confidence or authority, he could not have obtained:

(2) When a person, whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment he would not have consented, although such treatment may not amount to coercion." *Srimati Kamini Soondari Chowdhrani* v. *Kali Prosunno Ghose* (1) was decided while this provision of law was in force. That was a suit for the recovery of money due under a mortgage bond. The plaintiff was the *mukhtear* of the defendant who was a *purdanashin* lady; and the question was whether with regard to the rate of interest it was an unconscionable bargain in which undue advantage was taken of the lady by her *mukhtear*, the plaintiff. Their Lordships of the Privy Council accepted the finding of the lower Court against fraud and undue influence and they were of opinion that the whole transaction could not be therefore set aside. But assuming the validity of the mortgage, the question was argued before them whether the agreement about the rate of interest was not an unconscionable bargain such as a Court of Equity could relieve against. They followed the English Law as laid down by the MASTER OF THE ROLLS in *Beynon* v. *Cook*(2), and quoted the following passage with approval "'The point to be considered is, was this a hard bargain? The doctrine has nothing to do with fraud. . . . It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and if it is what is called a hard bargain sets it aside. . . . It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many judges" Following this judgment they held that the compound interest charged was exorbitant and unconscionable and as the purchaser took full notice of these circumstances it should not be allowed and

(1) (1885) 12 I.A., 215. (2) (1875) L R , 10 Ch , 389 at p. 391.

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accordingly reduced it. The decision establishes that though the agreement is valid so far as the Contract Act is concerned, though there is neither fraud nor undue influence, it will not be enforced if such as will be relieved against in a Court of Equity. Their Lordships say "The finding of the lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction. But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against" and accordingly reduced the interest as pointed out above. Similarly in another case where the plaintiffs had, in the belief that the defendant's claim to an estate was well founded, advanced the sums necessary to enable him to prosecute the *successful appeal to the Privy Council it was held that the reward* stipulated for was in the circumstances, excessive and unconscionable. The Judicial Committee of the Privy Council held that it was so and they accordingly set aside the agreement and awarded the plaintiff reasonable damages. See *Rajah Mokham Singh* v. *Rajah Rup Singh*(1). It will be observed that relief was awarded to the plaintiffs in these cases not on the ground that they were procured by undue influence as defined by section 16 of the Indian Contract Act but on the broad grounds on which relief was awarded by the English Courts of Equity. In *Dhanipal Das* v. *Raiah Maneshar Bakhsh Singh*(2), Lord DAVEY is however reported to have said "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended s. 16 only." This would be in direct conflict with the judgment in *Srimati Kamini Soondari Chowdhrani* v. *Kali Prosunno Ghose*(3) already cited unless we are to assume that amending the Act the legislature intended to embody in section 16 the rules enforced in this respect by the English Courts of Equity and among them the rule that a transaction may be so unconscionable and the extortion so great as to be evidence of undue influence. I am of opinion that the amendment was made for that purpose and that the substituted

(1) (1893) 20 I.A., 127 (2) (1906) 33 I.A., 118 at p. 127.
(3) (1885) 12 I.A., 215.

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definition of undue influence includes within its scope cases which did not fall within the section as it originally stood According to this section there are two elements necessary. One of the parties to the contract must be in a position to dominate the will of the other and he must have used that position to have obtained unfair advantage over the other. Now excessive interest in itself may not be a ground for relief but it may be evidence of the fact that the debtor must have been in a very helpless condition to accept the terms imposed by the creditor. The exorbitant nature of the interest itself may be evidence of that It may also be evidence that he must have used it to obtain unfair advantage over the other if the position of the parties is such that we may fairly presume that otherwise the debtor would not have accepted those terms In the present case the contract rate of interest is 60 per cent The debtors were women who were not able to enter into the transaction themselves They had applied for loans in other quarters and they had failed. The properties were going to be sold. It, therefore, these facts had stood alone it might be fairly presumed that unless the defendants were in a distressed condition and utterly helpless in the matter and the plaintiff had not taken advantage of this position they would not have cared to pay this interest. In this case, however, it appears that the loan was negotiated by the plaintiff's fifth witness, Sitapathi Naidu, who had a power of attorney from all these defendants It is impossible to hold that he was in any condition of helplessness and that his mind was in any way dominated by that of the creditor It was suggested in argument before us that the creditor, the payee, was only the benami holder but the evidence does not support this suggestion It was also argued that he was in some way interested in the loan. That also has not been established whereas we have the facts admitted that some of the debtors in this case are his own daughters and that the promissory note was attested by the husband of another female debtor I am, therefore, clearly of opinion that one of the conditions necessary for the granting of relief does not exist in this case. Though as I have pointed out above the rate of interest provided in the promissory note in itself might, in the circumstances, show that the transaction was unconscionable and that the plaintiff used his position to dominate the will of the defendants, in this case such presumption is rebutted. I am, therefore,

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of opinion that the defendants are not entitled to any reduction of interest and I agree in the decree proposed by his Lordship THE CHIEF JUSTICE.

SANKARAN NAIR, J.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Ayyar.

1912. October 3, November 11 and Decem- Ler 18.

M. ANNAPURNAMMA [LEGAL REPRESENTATIVE OF M. CHELAMARAZU (DECEASED), FIRST DEFENDANT], APPELLANT,

v.

U. AKKAYYA AND TWO OTHERS (FIRST AND SECOND PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS *

Negotiable Instrument in favour of several—Discharge by one of several payees, validity of.

Held by the Full Bench (THE CHIEF JUSTICE dissenting) that one of several payees of a Negotiable Instrument can give a valid discharge of the entire debt without the concurrence of the other payees.

APPEAL against the decree of T. T. RANGACHARIAR, the District Judge of Guntur, in Original Suit No. 4? of 19.8.

The facts are given in the following opinion of SANKARAN NAIR, J.

M. O. Parthasarathi Ayyangar and *V. Ramesam* for the appellant.

T. Prakasam for respondents Nos 1 and 2.

The third respondent was unrepresented.

This appeal coming on for hearing the Court (BENSON and SANKARAN NAIR, JJ.) made the following

BENSON AND SANKARAN NAIR, JJ.

ORDER OF REFERENCE TO A FULL BENCH.—The promissory note, Exhibit (B), was executed by the first defendant in favour of the two plaintiffs described therein as minors and the second defendant who was not a minor. The suit was brought by the two plaintiffs, one of whom, the second plaintiff, is even now a minor. The question for decision is whether the suit is barred by limitation. It is contended on behalf of the first defendant that the second defendant was entitled to receive the amount due under the promissory note and give a full discharge of the entire debt without the concurrence of the two plaintiffs and

* Appeal No. 218 of 1902

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time therefore ran against all the plaintiffs who were not accordingly entitled to any extension of time under section 7 of the Limitation Act. In support of this contention, the decision in *Barber Maran* v. *Ramana Goundan*(1) is relied upon. In that case, it was held that a payment made to one of two persons jointly entitled under a mortgage bond, who was not an agent of the other, is a valid discharge of the entire debt. That decision was followed in *Kottakota Yerakayya* v. *Peddinti Chilakanna*(2) and *Subraya Mudali* v. *Valayuda Chetty*(3). It was dissented from in *Ramasami* v. *Muniyandi*(4). In *Sheik Ibrahim Tharagan* v. *Rama Aiyar*(5) the question was considered but not decided. We do not in this order of reference consider it necessary to refer to the cases decided by the other courts which have been referred to in the arguments before us. The question is one of importance and considering the conflict of authorities, we refer to the Full Bench for decision the question

"Whether one of three payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other two payees?"

We may point out that no valid reason has been suggested before us for any distinction between the claims under a mortgage bond and a negotiable instrument.

This reference coming on for hearing the Court expressed the following OPINION:—

WHITE, C.J.

THE CHIEF JUSTICE.—The question raised in the Order of Reference was considered by this Court in the judgment to which I was a party in the case of *Ramasami* v. *Muniyandi*(4). I adhere to the view expressed in that judgment. Section 38 of the Contract Act provides that, where the promisor has made an offer of performance and the offer has been refused, the promisor is not responsible for non-performance The last paragraph of the section provides that an offer to one of several joint-promisees has the same legal consequences as an offer to all of them. It provides in effect that all the joint-promisees get the benefit of the legal consequences, whatever those consequences may be, of an offer, or a tender, to one of them The section does not deal with the legal consequences of an accepted tender,

(1) (1897) I.L.R., 20 Mad., 461 (2) Second Appeal No. 1511 of 1902.
(3) (1907) I.L.R., 30 Mad., 153 (4) (1910) 20 M.L.J., 709.
(5) (1912) I.L.R., 35 Mad., 685

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or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted. No doubt the last paragraph of the section is general and is not restricted to an offer which has not been accepted, but apparently the Legislature were not contemplating the legal consequences of an offer which had been accepted but the legal consequences of an offer which has been refused. I do not think we can infer from this enactment that the Legislature intended to lay down by implication that the acceptance of payment by one of several promisees operated as a discharge of the claims of the others. On the other hand, as it seems to me now, section 45, which deals with the devolution of rights, where a person has made a promise to two or more persons "jointly," throws very little, if any, light on the question we have to decide. The section prescribes the way in which the rights are to devolve, but says nothing as to how these rights are affected by a transaction between the promisor and one of the promisees. For the purpose of prescribing the way in which the rights are to devolve, it, of course, assumes that these rights exist, but that is all I do not think that much assistance can be derived from a consideration of the provisions of analogous sections of the Contract Act. If reliance can be placed on the provisions of section 165 that a delivery to one of several joint bailees is good as against all in support of the contention that our answer to the question should be in the affirmative, reliance can equally be placed on the provisions of section 44 that a release by one of several joint promisees does not discharge the others, in support of the contention that our answer should be in the negative; and the maxim *expressio unius est exclusio alterius* applies with equal force to any argument founded on either section. If we are unable to find an answer to the question within the four corners of the Contract Act, we have to look to the general law and to see whether the rule of law, as laid down in *Wallace* v. *Kelsall*(1) applies or whether the rule or rather the presumption of equity on which *Steeds* v. *Steeds*(2) was decided is to prevail.

I think the equitable presumption applies, and I do not think this presumption is negatived by the provisions of the Contract Act or rebutted by the facts stated in the Order of Reference.

(1) (1840) 7 M. & W., 264 (16 R.R., 767) (2) (1889) 22 Q.B.D., 537.

As regards sections 78 and 82 of the Negotiable Instruments Act 1881, it seems to me that for the purposes of the question we have to decide the "holder" of the instrument must be taken to be the three payees, and not one or two of them. I would answer the question which has been referred to us in the negative. ANNAPURNAMMA v. AKKAYYA. WHITE, C.J.

SANKARAN NAIR, J.—A promissory note was executed by the first defendant in favour of the two plaintiffs who were minors and the second defendant who was not a minor. The suit was brought by the two plaintiffs more than three years after the promissory note became payable. The question for decision is whether the suit is barred. SANKARAN NAIR, J.

It was admitted in argument before the Divisional Bench that section 7 of the Limitation Act did not apply to the case, because under the rulings of this court it applies only where there is a sole plaintiff or where all the claimants were minors at the time the cause of action arose. Here the second defendant was admittedly not a minor and therefore that section does not apply. See *Seshan* v *Rajagopala*(1), *Vigneswara* v *Bapayya*(2) and *Periasami* v. *Krishna Ayyan*(3). But it was argued that under section 8 of the Limitation Act of 1877 (section 7 of Act IX of 1908) time ran against all the plaintiffs as the second defendant was competent to give a discharge for the satisfaction of the joint claim of himself and the plaintiffs without the concurrence of those two creditors and that therefore the suit was barred against these plaintiffs. There is a conflict of decisions on this point, and the question whether the second defendant was entitled to give a valid discharge of the entire debt without the concurrence of the two plaintiffs was accordingly referred to the Full Bench for decision. It is conceded that if the case *Barber Maran* v. *Ramana Goundan*(4) is rightly decided, then the plaintiffs' claim is barred. In that case it was held that a payment made to one of two persons jointly entitled under a mortgage bond, who was not an agent of the other, is a valid discharge of the entire debt, and the decision in *Wallace* v. *Kelsall*(5), and section 38 of the Indian Contract Act were referred to in support of that conclusion. The decision in

(1) (1890) I.L.R., 13 Mad., 236. (2) (1893) I.L.R., 16 Mad., 436.
(3) (1902) I.L.R., 28 Mad., 431 F.B.). (4) (1897) I.L.R., 20 Mad., 461.
(5) (1840) 7 M. & W., 264 (56 R.R., 707).

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SANKARAN NAIR, J.—A promissory note was executed by the first defendant in favour of the two plaintiffs who were minors and the second defendant who was not a minor. The suit was brought by the two plaintiffs more than three years after the promissory note became payable. The question for decision is whether the suit is barred.

It was admitted in argument before the Divisional Bench that section 7 of the Limitation Act did not apply to the case, because under the rulings of this court it applies only where there is a sole plaintiff or where all the claimants were minors at the time the cause of action arose. Here the second defendant was admittedly not a minor and therefore that section does not apply. See *Seshan* v *Rajagopala*(1), *Vigneswara* v *Bapayya*(2) and *Periasami* v *Krishna Ayyan*(3). But it was argued that under section 8 of the Limitation Act of 1877 (section 7 of Act IX of 1908) time ran against all the plaintiffs as the second defendant was competent to give a discharge for the satisfaction of the joint claim of himself and the plaintiffs without the concurrence of those two creditors and that therefore the suit was barred against these plaintiffs. There is a conflict of decisions on this point, and the question whether the second defendant was entitled to give a valid discharge of the entire debt without the concurrence of the two plaintiffs was accordingly referred to the Full Bench for decision. It is conceded that if the case *Barber Maran* v *Ramana Goundan*(4) is rightly decided, then the plaintiffs' claim is barred. In that case it was held that a payment made to one of two persons jointly entitled under a mortgage bond, who was not an agent of the other, is a valid discharge of the entire debt, and the decision in *Wallace* v. *Kelsall*(5), and section 38 of the Indian Contract Act were referred to in support of that conclusion. The decision in

(1) (1890) I.L.R., 13 Mad., 236. (2) (1893) I.L.R., 16 Mad., 436.
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(5) (1840) 7 M. & W., 264 (56 R.R., 707).

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Wallace v. *Kelsall*(1) was based upon two grounds. The first was that if after payment of the debt to one of the payees the others died and the only person surviving was the person who received the money he could not have sued for the debt. The second ground was that if the payee who received the debt was barred, he could not be allowed to recover by joining the others in an action to undo his own act. Let us see how far the arguments apply to the case before us. The first ground obviously does not apply because under section 45 of the Contract Act, unless the contrary intention appears from the contract, the right to claim performance from the defendant rests, as between him and the *payees, with them during their joint lives, and, after the death* of any one of them, with the representative of such deceased person jointly with the survivor or survivors, *i.e.*, if both the plaintiffs die, the right to claim the money does not survive solely to the benefit of the second defendant, but survives to the benefit of the second defendant and the representatives of the two plaintiffs. The first ground therefore has no application.

We have to consider whether the second ground applies. If the plaintiffs Nos. 1 and 2 are now entitled to recover their shares of the debt from the first defendant, then the second ground would not apply. If they are entitled to bring the suit against the first defendant to recover the entire debt on behalf of themselves and of the second defendant and for their joint benefit, and not their share only, then it is clear that the second ground would apply.

Now, it appears to me that under section 45 of the Contract Act *they are all bound to sue to recover the entire debt or, if any* one of them refuses to join as plaintiff, he is to be made a defendant and the suit must be for the recovery of the entire debt. The section distinctly states that it is a joint claim and they must sue jointly. This is made clear also in the case of promissory notes by sections 78 and 82 of the Negotiable Instruments Act. Section 78 prescribes that the debt should be paid to the holder of the promissory note and section 82, to the holder thereof, in other words to all the payees. I am therefore unable to agree with the decisions which hold that in India each payee must be considered to be entitled to bring a separate suit for the recovery of his own share.

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(1) (1840) 7 M. & W., 264 (56 R.R., 707).

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Section 38 of the Contract Act also supports the same view. It says that "an offer to one of several joint promisees has the same legal consequences as an offer to all of them"; and under the first clause the promisor is not responsible for non-performance if his offer has not been accepted. It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment therefore must be treated as a complete discharge. The decision that one co-heir cannot give a discharge for the claim of the others does not apply to this case.

It is said that the authority of *Wallace* v. *Kelsall*(1) has been considerably shaken by later English decisions. It is unnecessary to enquire whether this is so or not as English decisions are not precedents which govern us, but are only referred to for the purpose of finding out the principle underlying those decisions and to explain the Indian Statutes which are usually framed with reference to those decisions. The cases cited are later than the Contract Act. It has also to be remembered that, while the English law as laid down in *Wallace* v *Kelsall*(1) allowed one creditor to give a valid discharge, it did not generally allow him to sue alone. But the Roman law and those Continental systems which followed it allowed one creditor to sue alone for the *entire* debt. See Evans Pothies I,144 II, 55 ss The Contract Act therefore in allowing payment to be made to one creditor was in strict accordance with the Roman and the English law as then understood

I am therefore of opinion that if payment of the debt had been made to the second defendant he was entitled to receive such payments and it would be a valid discharge as against the plaintiffs. I answer the question in the affirmative.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The short question referred to the Full Bench in this case is whether one of three payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other two payees. The learned Judges who referred this point themselves point out that no valid reason exists for any distinction between the claims under a

(1) (1840) 7 M. & W., 264 (56 R.R., 707).

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mortgage bond and under a negotiable instrument, so far as the decision of the above question is concerned. I might go further and say that if in the case of a mortgage bond in favour of several joint mortgagees one joint mortgagee can give a valid discharge binding on the others, the right of a joint promisee under a negotiable instrument to give such a valid discharge must stand on even a higher footing, the exigencies of trade requiring even greater protection to be given to those liable under a promissory note than to those liable under a mortgage bond [see *Subba Narayana Vathiyar* v. *Ramasami Aiyar*(1) and *Konetti Naicker* v. *Jutu Gopalaiyar*(2)].

There is the direct authority of the decision in *Barber Maran* v. *Ramana Goundan*(3), laying down the proposition that payment to one joint promisee is valid as against all the promisees. No doubt there are *obiter dicta* in *Jagat Tarini Dasi* v. *Nabagopal Chaki*(4), *Hossainara Begam* v. *Rahimannessa Begam*(5), *Ahinsa Bibi* v. *Abdul Kader Saheb*(6), *Sitaram* v. *Shridhar*(7) and *Sheik Ibrahim Tharagan* v. *Rama Aiyar*(8), which express doubts about the soundness of the conclusion in *Barber Maran* v *Ramana Goundan*(3). But in all those cases, the real question was whether the several heirs or legal representatives of a promisee themselves become joint promisees within the meaning of section 38 of the Contract Act, and it was held that they did not constitute in the eye of the law joint promisees so as to make the payment to one of them have the legal effect of payment to all. In *Ahinsa Bibi* v. *Abdul Kader Saheb*(6) itself, that learned Judge Sir V. BHASHYAM AYYANGAR admits that there might be a distinction between payment to one of several joint promisees under the original contract and payment to one of the several heirs of a promisee under the original contract. He says "it may be that when money is advanced to one, by several persons jointly, each of them authorises the others, by implication, to act on his behalf, *and a release or discharge therefore, of the claim, by one, is binding upon the others.*" I think that this rule is a sound rule as it gives the requisite safety to the promisor. Supposing that the several joint promisees quarrel with one another and refuse to join in receiving the money, how

(1) (1907) I.L.R., 30 Mad., 88.
(2) (1912) M.W.N., 984.
(3) (1897) I.L.R., 20 Mad., 461.
(4) (1907) I.L.R., 34 Calc., 305.
(5) (1911) I.L.R., 38 Calc., 342.
(6) (1902) I.L.R., 25 Mad., 26 at p. 39.
(7) (1903) I.L.R., 27 Bom., 292.
(8) (1912) I.L.R., 35 Mad., 685.

is the debtor to make a tender to them jointly in order to prevent interest running or to bring them together to one place in order to put the money before all of them. Section 38 of the Contract Act seems to be clear upon the point. The argument that section 38 merely refers to an offer to one of several joint promisees and does not deal with the effect of a payment to one of several joint promisees seems to me with the greatest respect, not to create any difficulty. Supposing that an offer to one of several joint promisees to pay the money is accepted by him instead of being rejected by him, can the debtor who makes the offer withdraw from the offer on the ground that if he makes the payment it will not discharge him from liability to the others? What is the meaning of such an idle offer which, when accepted, does not consummate in payment? I think that an offer with the intention of not completing it by performance cannot be called an offer at all (see clause 2 in section 38 which says that the person making the offer must be "able and willing there and then to do the whole of what he is bound by his promise to do" and must even give the promisee an opportunity of ascertaining the promisor's said readiness). The considerations put forward in *Barber Maran* v *Ramana Goundan*(1) and in the notes to section 84 of the Transfer of Property Act by SHEPHARD, J seem to me to have much cogency. [See also critical note in (1911) 21 M L.J. (Journal portion), pages 55 to 59.] *Wallace* v. *Kelsall*(2), was decided in 1840 and was good law when the Indian Contract Act was passed in 1872, the said Act following the principles of the said English decision. Section 165 of the Contract Act embodies the same principle for the protection of the obligor viz., that the bailee's delivery of goods to one joint owner, out of the several joint bailors *even without the consent of the others* will release the bailee from his obligation. In fact the debtor owing money to several joint promisees, a few of whom may die and a few of whom would be minors, would feel the greatest difficulty in discharging his obligation if he should not be allowed to make a *bonâ fide* payment to one of them. In the case of a mortgage, the debtor may not be in such a great difficulty because there is a provision for tender through court in the Transfer of Property Act itself. (See section 83) As SHEPHARD, J. points out, *Wallace* v *Kelsall*(2), was stated in

(1) (1897) I.L R, 20 Mad, 461. (2) (1840) 7 M & W, 264 (56 R R, 707).

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Powell v. *Brodhurst*(1), to still remain good law and was not intended to be over-ruled. Anyhow, Indian Courts are bound by the Indian Contract Act and even if the authority of *Wallace* v. *Kelsall*(2), has been doubted by English Courts long after the Contract Act was passed in India, Indian Courts must, it seems to me, follow the rule of law laid down in that statute. The argument based on section 45 of the Contract Act, viz., that all the joint promisees should join in claiming performance and on sections 8, 51, 78 and 82 of the Negotiable Instruments Act which lead to the same conclusion, viz., that one joint promisee alone cannot compel the promisor to perform the promise without joining the other promisees, these provisions seem to me to have little relevancy to the decision of the question why the provisions made in sections 38 and 165 of the Contract Act for the protection of the obligor, releasing him from further performance on his legally tendering (and paying as a necessary result if tender is accepted) to one of the several joint promisees, should not be given their full beneficial effect in favour of the obligor. The consideration whether it is not more equitable to treat joint promisees as joint and several promisees also seems to me to have not more force than the counteracting consideration whether it is equitable to make the debtor undergo the risk of inquiries as to the respective rights of the several promisees when he is ready to discharge the obligation in its entirety by payment to any of them, leaving them to decide their disputes among themselves. As SIR BHASHYAM AYYANGAR, J. put it, the law laid down in section 38 of the Contract Act (and, I may add section 165 also) seems to treat each joint promisee as a partner or agent of the other joint promisees to accept tender, and, of course, payment after tender is accepted. A payment to one should therefore be treated as having the legal effect of a payment to all. I would, therefore, answer the question referred to us in the affirmative

On this appeal again coming on for final hearing on the 14th day of February 1913, before BENSON and SANKARAN NAIR, JJ., the Court delivered the following judgment :—

BENSON AND SANKARAN NAIR, JJ.

JUDGMENT.—Following the opinion of the Full Bench we reverse the decree of the lower Court and dismiss the suit as it s barred by limitation. The appellant is entitled to his costs throughout.

(1) (1901) 2 Ch., 160. (2) (1840) 7 M. & W., 264 (56 R.R., 707).

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1912.
January,
12 and 31
and
March 6.

SUBBA CHARIAR (PETITIONER, DECREE-HOLDER),
APPELLANT,

v.

MUTHUVEERAN PILLAI AND SIX OTHERS (RESPONDENTS, JUDGMENT-DEBTORS), RESPONDENTS.*

Limitation Act (XV of 1877), arts. 178 *and* 179—*Article* 179 *applies to initiate proceedings—Previous orders in execution, effect of, as* res judicata—*Civil Procedure Code (Act XIV of* 1882), *attachment under, when ceases, a question of intention—Erroneous order on a question of law, when* res judicata

Previous orders passed in execution and allowing execution on a construction of a decree, as to mesne profits or as to interest or the like, have the force of *res judicata*, though the later application be in respect of a different subject matter Thus if under the old Civil Procedure Code (Act XIV of 1882) attachment of several properties had been made, and more than three years after such attachment, sale of some of those properties was ordered, on the supposition that the attachment was then subsisting, that order to sell will act as *res judicata* when a subsequent application for sale is made within three years thereafter to sell other properties originally attached. Under the old Civil Procedure Code, the question whether a particular attachment subsists at a certain time was a question of intention.

Ram Kirpal v *Rup Kuari* [(1884) I.L R, 6 All. 269 (P. C)], *Venkatanarasimha Naidu* v *Papammah* [(1896) I.L R, 19 Mad, 54], and *Subbarama Ayyar* v. *Nagammal* [(1901) I L R, 24 Mad 683], followed

The rule that an erroneous decision on a question of law has not the force of *res judicata* does not apply to such a case

Palaniappa Chettiar v *Savari Naidoo* [(1909) 18 M L J, 548], and *Mangalathammal* v *Narayanaswami Aiyar* [(1907) I L R 30 Mad, 461], distinguished.

It is well established that an application intended to revive and carry through a pending execution is not covered by article 179 of the Limitation Act (XV of 1877) as it is not an application to initiate a new execution.

Qamar-ud din Ahmad v *Jawahir Lal* [(1905) I L R, 27 All, 334 (P C)], and *Suppa Reddiar* v *Avudai Ammal* [(1905) I L R, 28 Mad, 50 (F B)], followed

The right to apply to continue execution in such cases accrues from day to day and will not be barred until three years have elapsed after the proceedings have ceased to be pending So the application is not barred under article 178 either

Chalavadi Kotiah v *Poloori Alimelammah* [(1908) I L R, 31 Mad., 71], followed.

* Civil Miscellaneous Appeal No 78 of 1910.

SUBBA ODAKIAR v. MUTHUVEERAN PILLAI. — BENSON AND ABDUR RAHIM, JJ.

APPEAL against the order of R. D. BROADFOOT, the District Judge of Coimbatore, in Execution Petition No. 15 of 1909 in Original Suit No. 40 of 1896.

The following facts are taken from the judgment of the Lower Court:—

"This is an application for sale of part of the property attached in Execution Petition No. 2 of 1904.

"The property was attached on 19th and 20th April 1904. In Execution Petition No. 5 of 1908, dated 30th September 1907, the sale of some items was asked for and sale was ordered (in my view this order was wrong).

"Execution Petition No. 2 of 1904 contains a prayer for sale which was not ordered as the decree-holder omitted to produce encumbrance certificate and draft proclamation for sale.

"On 26th July 1904 my predecessor dismissed the petition for want of prosecution. On 12th July 1909 the sale of some other items is asked for.

"Counter-petitioner urges that the attachment lapsed three years after it was made or any how three years after dismissal of the petition on 26th July 1904.

"Petitioner's pleader says that *Chalvadi Kotiah* v. *Poloori Alimelammah*(1), means that an attachment continues for ever, or at the lowest for six years, *i.e.*, three years after the expiration of the period of three years. The latter seems to me to be the real meaning of the ruling.

"But this concession seems to be held in the above ruling to apply to cases in which the Court was bound to Act and failed to do so and not to cases in which the party was bound to do something and failed to do it. *Ambica Pershad Singh* v. *Surdhari Lal*(2).

"I think in the present case the proper limitation is three years from the date of the order dismissing the petition for failure to produce draft proclamation, *i.e.*, the limitation terminated on 27th July 1907.

"It follows that the present petition is barred and is dismissed. No costs as the rulings are conflicting."

The decree-holder appeals.

N. Rajagopalachariar for appellant.

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(1) (1906) I.L.R., 31 Mad., 71. (2) (1881) I.L.R., 8 Calc., 851 at p. 858 (F.B.).

SUBBA CHARIYAR v. MUTHUVEERAN PILLAI.

BENSON AND ABDUR RAHIM, JJ.

T. Rangachariar and *T. Narasimha Ayyangar* for the respondents.

JUDGMENT.—The District Judge of Coimbatore has held that the application of the appellant decree-holder, dated 12th July 1904, praying for an order directing sale of the properties set out in the schedule appended to the application which along with some other items were attached in pursuance of a previous petition No. 2 of 1904 is barred by limitation because the application was made more than 3 years after an order, dated 26th July 1904, by which the petition No 2 of 1904 was dismissed for non-prosecution inasmuch as that petition not only contained a prayer for attachment which was in fact granted but also a prayer for sale and the appellant failed to produce a draft proclamation. It appears, however, that on 30th September 1907 some of the items attached under Execution Petition No 2 of 1904 were brought to sale on an application made sometime in 1908 on the footing that the attachment still subsisted in spite of the order of dismissal passed on 26th July 1904 The present application is within 3 years of the application of 1908. The learned Judge thinks that the order allowing the application of 1908 is wrong, in his opinion it ought to have been dismissed inasmuch as the attachment according to him had ceased to operate on 26th July 1904 and he would not therefore give the application of 1908 or the order thereon any effect. We are unable to uphold this view. In the first place the judgment-debtor is estopped from contending that the attachment does not subsist. His learned vakil argues that the question whether the attachment made in 1904 continued or not in spite of the order of 26th July 1904 is one of law and therefore the order of 1908 allowing sale of some of the properties under attachment being a wrong decision on a question of law cannot preclude him from showing that the attachment came to an end by the order of 26th July 1904. But the question whether an order dismissing an application for execution put an end to the attachment is one of intention as pointed out in *Gobinda Chandra Pal* v. *Dwarka Nath Pal*(1) and has to be determined upon the circumstances of each case. No doubt Order XXI, rule 57 of the present Code, lays down that where any property

(1) (1906) I L R, 33 Calc, 660

SUBBA CHARIAR v. MUTHUVEERAN PILLAI. — BENSON AND ABDUR RAHIM, JJ.

has been attached but by reason of the decree-holder's default, the Court is unable to proceed further with the application for execution and dismisses the application, the attachment shall cease on such dismissal. But this is a new provision which found no place in the Code of 1882 and the effect of the decisions under the old law which we do not think it is necessary to review on this occasion supports the proposition laid down in the Calcutta case. None of the cases cited by Mr. Rangachari such as *Palaniappa Chettiar* v. *Savari Naidoo*(1) and *Mangalathammal* v. *Narayanswami Aiyar*(2), which lay down that an erroneous decision on a question of law has not the effect of *res judicata* when the subsequent proceeding relates to a different subject-matter, have therefore any application to the present case.

On the other hand this case is covered by *Ram Kirpal* v. *Rup Kuari*(3), where it was held that a question as to whether upon proper construction of a decree *mesne* profits could be recovered under it was concluded by previous orders in execution and by *Venkatanarasimha Naidu* v. *Papammah*(4) and *Subbarama Ayyar* v. *Nagammal*(5), where the principle of *res judicata* was applied to similar questions relating to the construction of decrees

The learned vakil for the respondents next argues that even if the attachment be held to be subsisting the application is barred under article 178 which allows three years for applications for which no period of limitation is provided elsewhere counting from the date on which the right to apply accrues. This he says is the date of attachment.

We may take it as well established that an application like this which is intended to revive and carry through a pending execution is not covered by article 179 as it is not an application to initiate a new execution. See *Qamar-ud-din Ahmad* v. *Jawahir Lal*(6) and *Suppa Reddiar* v. *Avudai Ammal*(7). It does not follow however that under article 178 the application will be barred because it was made 3 years after the date of attachment. This question which is not free from difficulty was fully considered in a recent decision of this Court by MILLER and

(1) (1908) 18 M.L.J., 54?. (2) (1907) I.L.R., 30 Mad., 461.
(3) (1884) I.L.R., 6 All., 269 (P.C.). (4) (1896) I.L.R., 19 Mad., 54.
(5) (1901) I.L.R., 24 Mad., 6?3. (6) (1905) I.L.R., 27 All., 334 (P.C.)
(7) (1905) I.L.R., 28 Mad., 50 (F.B.)

MUNRO, JJ., in *Chalavadi Kotiah* v. *Poloori Alimelammah*(1), and we agree with them that where an application is made to continue proceedings in a pending execution the right to apply accrues from day to day and will not be barred until 3 years have elapsed after the proceedings have ceased to be pending. This proposition is deducible as pointed out in that case from the course of decisions on the subject. See *Venkatappiah* v. *Jagannatha Rao*(2), *Chowdhry Paroosh Ram Das* v. *Kali Puddo Bannerjee*(3), *Kedernath Dutt* v. *Harra Chand Dutt*(4) and *Qamar-ud-din Ahmad* v. *Jawahir Lal*(5).

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The appeal must therefore be allowed and the District Judge will be directed to dispose of the Execution Petition No. 15 of 1909 according to law. The respondents must pay the cost of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

K. R. MANICKA MUDALIAR (PLAINTIFF), APPELLANT,

1912 July 23

v.

T. CHINNAPPA MUDALIYAR AND ELEVEN OTHERS (DEFENDANTS Nos. 2 AND 4 TO 11 AND PARTY, RESPONDENTS), RESPONDENTS *

Landlord and tenant—Lease until lessee requires or wishes—Tenancy at will on both sides

A lease by which the lessees are to hold for such time as they require or wish is a tenancy at the will of the lessee which in law is a tenancy at the will of the lessor also.

"Coke on Littleton," page 55 (*a*), and Halsbury's Laws of England, volume 18, page 434, referred to.

APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Original Suit No. 9 of 1905.

The facts of this case are clearly stated in the judgment.

T. Rangachariyar, S. S. Venkataramana Ayyar, V. Viswanatha Sastri, (Messrs. *Venkatasubba Rao* and *Radakrishnayya*) for the appellant.

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(1) (1908) I.L.R., 31 Mad., 71. (2) (1902) 12 M.L.J., 25
(3) (1890) I.L.R., 17 Calc., 53 (4) (1882) I.L.R., 8 Calc., 420.
(5) (1905) I.L.R., 27 All., 334 (P.C.)
* Appeal No. 53 of 1907

MANICKA v. CHINNAPPA. — MILLER AND ABDUR RAHIM, JJ.

C. V. Ananthakrishna Ayyar for respondents Nos. 2, 4 and 6.

JUDGMENT.—We find ourselves unable to differ from the conclusion of the District Judge on the facts. We think the plaintiff is bound by the lease evidenced by Exhibit C. By that document the lessees are to hold for such time as they require, or wish, and it is argued that the contract is thus expressed to be a tenancy at the will of the lessee and so by implication of law a tenancy at the will of the lessor also. This contention is supported by reference to "Coke on Littleton," page 55 (*a*), and is in accordance with the law of England as laid down in 18 "Halsbury," page 434.

We agree that the lease is expressed as creating a tenancy at the will of the lessees and we have not been shown sufficient reasons for refusing to adopt the English law on the point. We think therefore that the plaintiff was entitled to terminate the tenancy, and he has done so.

The District Judge's decision must be modified and the plaintiff must have a decree for recovery of possession of the market in addition to the decree for rent given by the District Judge, for *mesne* profits at the rate of Rs. 18 a month till delivery of possession from date of plaint.

Each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (FIFTEENTH DEFENDANT), APPELLANT, 1912, July 24.

v.

I. SUBBARAYUDU AND FOUR OTHERS (PLAINTIFFS NOS. 1 AND 2 AND THIRD PLAINTIFF'S LEGAL REPRESENTATIVE AND DEFENDANTS NOS. 4 AND 3), RESPONDENTS.*

Pensions Act (*XXIII of* 1871), *sec* 4.—*No distinct grant of land revenue,—section* 21, *no bar—Madras Hereditary Village Offices Act* (*III of* 1895), *"any claim to recover emoluments of an office", meaning of—Regulation VI of* 1831—*No jurisdiction for Revenue Courts to decide what are emoluments or to decree possession*—Res judicata.

Section 4 of the Pensions Act (XXIII of 1871) is a bar to a civil suit only where the Court is able to hold that there was a distinct grant of the land-revenue itself, and where there is nothing to show that in the hands of Government before the grant of the *inam*, the land was treated as liable for the payment of land revenue or that the Government intended to split up its ownership into *melvaram* and *kudivaram* or to make a distinct grant of the land-revenue, section 4 of the Pensions Act cannot have any application with reference to a suit for the recovery of such land alleged to have been granted as *inam*.

Her Highness Mathu Sri Jeijamba Bai Sahib v *Secretary of State*, [Appeal No. 10 of 1908, (1912) 23, M L J, 687], explained and followed.

The words "any claim to recover the emoluments of an office" in the Madras Hereditary Village Offices Act (Madras Act III of 1895), section 21 can only mean a claim to recover what in fact are the emoluments of an office or possibly what are claimed by the plaintiff to be the emoluments of an office, and cannot by any rule of construction be extended to include a claim to recover what the plaintiff denies to be the emoluments of an office but what the defendant alleges to be such emoluments.

Kesiram Narasimhulu v. *Narasimhulu Patnaidu*, [(1907) I.L.R., 30 Mad., 126], explained and distinguished.

Under Madras Regulation VI of 1831, which was repealed by the Madras Hereditary Village Offices Act (III of 1895), the revenue courts had no jurisdiction to decide what were the emoluments of an office or to declare possession against a person alleged to be a trespasser. Hence neither section 21 of Act III of 1895 nor Regulation VI of 1831 is bar to the suit.

Ravutha Koundan v. *Muthu Koundan*, [(1890) I L R., 13 Mad , 41], referred to.

Therefore a decision under the Regulation VI of 1831 cannot operate as *res judicata* with reference to a suit for lands in a civil court.

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* Second Appeal No. 829 of 1911

SECRETARY OF STATE v. SUBBA-RAYUDU.

SECOND APPEAL against the decree of A. N. ANANTARAMA AYYAR, the temporary Subordinate Judge, Guntur, in Appeal No. 150 of 1906, presented against the decree of C. RANGANAYAKULU NAYUDU, the District Munsif of Narasarowpet in Original Suit No. 125 of 1905.

The facts of this case are clearly stated in the judgment.

C. F. Napier the Government Pleader, for the appellant.

P. Narayanamurthi for the respondents.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT.—The plaintiffs in the suit claim to recover certain lands as belonging to them as an *inam* for the *archakatheeam* or worship of a family deity. They allege that they were dispossessed by defendants Nos. 1 to 3 in execution of a decree of the Revenue Court in Original Suit No. 1 of '91 They impeach the decree as one passed without jurisdiction by the Revenue Court and therefore not affecting their rights. The fifteenth defendant is the Secretary of State for India in Council and was impleaded as a party in consequence of the contention raised by defendants Nos. 1 to 3. They allege that the lands appertain to the office of *karnam* which is held by the first defendant and that the plaintiffs have no right to recover them. They also deny the jurisdiction of the civil courts to entertain the suit. It is also contended that the plaintiffs' right is *res judicata* in consequence of the decision in Original Suit No. 1 of 1891. A question of limitation was also raised in the lower courts but has not been argued before us. Both the courts have found that the lands are not *karnam* service *inam* lands and that the plaintiffs are the owners. This finding has been attacked before us but we are unable to agree that the finding can be interfered with in Second Appeal. The lower Appellate Court relied upon Exhibit A, a register of *inams* prepared in the year 1790 in which the lands are not shown to be *karnam inam* lands. It is argued that the Subordinate Judge misconstrued Exhibit A and understood it as showing that the lands were *archaka inam* lands. We do not think that the Subordinate Judge has committed any error in the construction of the document. He observes "plaintiffs' grandfather Venkamrazu, worshipper of God, is described in it as the hereditary grantee of 4¼ *kuchalas* of land as *maniyam*." This observation is quite correct and it is quite clear that Exhibit A is inconsistent with the land being *karnam inam* lands. The Subordinate Judge does not say that the document shows that the land was held by

SECRETARY OF STATE v. SUBBARAYUDU.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

Venkamrazu as an *archaka inam*. He observes only that he is described as a hereditary grantee and is not stated as holding any land as *karnam* service *inam*. Assuming that Exhibit VI is in favour of the appellants' contention the Subordinate Judge has taken the document into consideration and given it such weight as in his opinion it deserves. It does not appear that Government took any final action on the statements contained in Exhibit VI. At any rate we cannot hold that the Appellate Court was bound to act on the contents of Exhibit VI. We must therefore accept the finding that the lands belong to the plaintiffs and are not *karnam* service *inam* lands.

The next question argued is that the Civil Courts have no jurisdiction to entertain the suit. This argument is based on two grounds. The first ground is that section 4 of the Pensions Act applies. That section enacts that "no Civil Court shall entertain any suit relating to any . . grant of . . . land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such . . . grant, and whatever may have been the nature of the payment, claim or right for which such . . . . grant may have been substituted." It was not the plaintiffs' case, nor the case of the defendants, that the inam whether it be a karnam service inam or some other kind of inam, consisted of land revenue. The plaintiffs alleged that the land itself was their *maniyam* and this position was not contested by any of the defendants The suit is therefore not one relating to any grant of land revenue. The learned Government Pleader argues that when the land is granted the land revenue is part of the grant and, so far as the *melwaram* right is concerned, the suit is not cognisable by the Civil Court without a certificate from the Collector; but there is nothing to show that in the hands of the Government before the grant of the *inam* the land was treated as liable for the payment of land revenue or that the Government intended to split up its ownership into *meluaram* and *kudivaram* or to make direct grant of the land revenue. The Government Pleader does not deny that the decisions of the High Courts would not support his contention except one, viz., the judgment of this Court in *Her Highness Mathu Sri Jeyamba Bai Sahib* v. *Secretary of State*(1). That case, however, lends no

(1) Appeal No. 10 of 1908, (1912) 23 M.L.J. 687.

SECRETARY OF STATE v. SOMBANAYUDU.

SECOND APPEAL against the decree of A. N. ANANTARAMA AYYAR, the temporary Subordinate Judge, Guntur, in Appeal No. 150 of 1906, presented against the decree of C. RANGANAYAKULU NAYUDU, the District Munsif of Narasarowpet in Original Suit No. 125 of 1905.

The facts of this case are clearly stated in the judgment.

C. F. Napier the Government Pleader, for the appellant.

P. Narayanamurthi for the respondents.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT.—The plaintiffs in the suit claim to recover certain lands as belonging to them as an *inam* for the *archakatheram* or worship of a family deity. They allege that they were dispossessed by defendants Nos. 1 to 3 in execution of a decree of the Revenue Court in Original Suit No. 1 of '91. They impeach the decree as one passed without jurisdiction by the Revenue Court and therefore not affecting their rights. The fifteenth defendant is the Secretary of State for India in Council and was impleaded as a party in consequence of the contention raised by defendants Nos. 1 to 3. They allege that the lands appertain to the office of *karnam* which is held by the first defendant and that the plaintiffs have no right to recover them. They also deny the jurisdiction of the civil courts to entertain the suit. It is also contended that the plaintiffs' right is *res judicata* in consequence of the decision in Original Suit No. 1 of 1891. A question of limitation was also raised in the lower courts but has not been argued before us. Both the courts have found that the lands are not *karnam service inam* lands and that the plaintiffs are the owners. This finding has been attacked before us but we are unable to agree that the finding can be interfered with in Second Appeal. The lower Appellate Court relied upon Exhibit A, a register of *inams* prepared in the year 1790 in which the lands are not shown to be *karnam inam* lands. It is argued that the Subordinate Judge misconstrued Exhibit A and understood it as showing that the lands were *archaka inam* lands. We do not think that the Subordinate Judge has committed any error in the construction of the document. He observes "plaintiffs' grandfather Venkamrazu, worshipper of God, is described in it as the hereditary grantee of 4¼ *kuchalas* of land as *maniyam*." This observation is quite correct and it is quite clear that Exhibit A is inconsistent with the land being *karnam inam* lands. The Subordinate Judge does not say that the document shows that the land was held by

Venkamrazu as an *archaka inam*. He observes only that he is described as a hereditary grantee and is not stated as holding any land as *karnam* service *inam*. Assuming that Exhibit VI is in favour of the appellants' contention the Subordinate Judge has taken the document into consideration and given it such weight as in his opinion it deserves. It does not appear that Government took any final action on the statements contained in Exhibit VI. At any rate we cannot hold that the Appellate Court was bound to act on the contents of Exhibit VI. We must therefore accept the finding that the lands belong to the plaintiffs and are not *karnam* service *inam* lands.

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The next question argued is that the Civil Courts have no jurisdiction to entertain the suit. This argument is based on two grounds. The first ground is that section 4 of the Pensions Act applies. That section enacts that "no Civil Court shall entertain any suit relating to any . . . grant of . . . land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such . . . grant, and whatever may have been the nature of the payment, claim or right for which such . . . grant may have been substituted." It was not the plaintiffs' case, nor the case of the defendants, that the inam whether it be a karnam service inam or some other kind of inam, consisted of land revenue. The plaintiffs alleged that the land itself was their *maniyam* and this position was not contested by any of the defendants The suit is therefore not one relating to any grant of land revenue. The learned Government Pleader argues that when the land is granted the land revenue is part of the grant and, so far as the *melwaram* right is concerned, the suit is not cognisable by the Civil Court without a certificate from the Collector; but there is nothing to show that in the hands of the Government before the grant of the *inam* the land was treated as liable for the payment of land revenue or that the Government intended to split up its ownership into *melwaram* and *kudivaram* or to make direct grant of the land revenue. The Government Pleader does not deny that the decisions of the High Courts would not support his contention except one, viz., the judgment of this Court in *Her Highness Mathu Sri Jeijamba Bai Sahib* v. *Secretary of State*(1). That case, however, lends no

(1) Appeal No 10 of 1908, (1912) 23 M.L.J. 657.

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support to his contention. It is in reality against it. It is held that the suit in that case was not cognisable by the Civil Courts because it related to a grant of land revenue. The instrument of grant, it was held, distinctly made a grant of the taxes due to the Government, although it may have been that the *kudivaram* also was granted. The grant of the *kudivaram* and *melvaram* was regarded as distinct and several. The earlier decisions under section 4 of the Pensions Act, 1871, were all reviewed in that judgment. The *ratio* of the decision was, as already indicated, that where the court is able to hold that there is a distinct grant of the land revenue itself a suit relating to it is not within the cognisance of the Civil Courts except with the sanction of the Collector. This argument must therefore fail.

The next contention urged in support of the plea of absence of jurisdiction in the Civil Courts is that under Regulation VI of 1831 which was the statute in force when suit No. 1 of 1891 was decided and section 21 of Act III of 1895 which repealed Regulation VI of 1831 and re-enacted the law applicable to hereditary village offices this suit is excluded from the jurisdiction of the Civil Courts. We may deal first with section 21 of Act III of 1895 as stress was particularly laid on the language of that section. It provides "that no Civil Court shall have authority to take into consideration or decide . . . any claim to recover the emoluments of any such office," *i.e.*, any of the offices specified in section 3. Now what is taken out of the jurisdiction of the ordinary tribunal according to the language of that section is a claim to recover the emoluments of an office. The finding of the Lower Appellate Court which we have upheld is that the lands in question are not the emoluments of the office of *karnam*, "any claim to recover the emoluments of an office" can only mean a claim to recover what in fact are the emoluments of an office or, possibly, what are claimed by the plaintiff to be the emoluments of an office. It cannot, in our opinion, by any rule of construction be extended to include a claim to recover what the plaintiff denies to be the emoluments of an office but what the defendant alleges to be such emoluments. The decision of this court in *Kesiram Narasimhulu v. Narasimhulu Patnaidu*(1), is strongly relied on by the learned Government Pleader. But

(1) (1907) I.L.R., 30 Mad., 123 at page 127.

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that case is of absolutely no use to him. The learned Chief Justice there says: "Reading the words emoluments of any such office" in section 21 in their ordinary sense, they would, as it seems to me, apply to a case, in which the plaintiff sues to recover lands which he alleges are the emoluments of his office, this being denied by the defendant. The plaintiff's sole ground of action is that the lands sued for are the emoluments of his office, and it seems to me the claim is none the less a claim for the emoluments within the meaning of the section, because the defendant denies that the lands in question constitute the emoluments." The reason underlying the decision apparently was that the plaintiff admitting that his claim was to the emoluments of an office could not take advantage of the defendant's plea; in other words, the plaintiff is bound by his own statement when the question is whether the suit is for the emoluments of an office. With respect to Regulation VI of 1831, it was held in *Ravutha Koundan* v. *Muthu Koundan*(1), that the revenue court had no jurisdiction to decide what were the emoluments of an office. Neither under Regulation VI of 1831 nor under section 21 of Act III of 1895 therefore can it be held that Civil Courts are deprived of jurisdiction to try the present suit.

The next contention of the appellant is that the plaintiff is barred by the rule of *res judicata* from enforcing his claim. According to the ruling in *Ravutha Koundan* v. *Muthu Koundan*(1) already referred to, the Revenue Court had no jurisdiction to decide what were the emoluments of an office or to decree possession against a person alleged to be a trespasser. We must therefore overrule this contention also.

The Second Appeal must substantially fail. We, however, agree that the Secretary of State for India in Council who was never in possession of the lands ought not to have been made liable for mesne profits and we modify the judgment of the Lower Appellate Court in so far as it directs the fifteenth defendant to pay *mesne* profits. With this modification we dismiss the Second Appeal with costs.

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(1) (1890) I L R, 13 Mad, 41.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. July 22 and 26.

KANDASAMI PILLAI (First Defendant), Appellant,

v.

NAGALINGA PILLAI and five others (Plaintiffs Nos. 1 and 3, Second Defendant, and the Legal Representatives of the First Respondent), Respondents.*

Estoppel—Evidence Act (I of 1872), sec. 115—Sale to plaintiff by B of land as his—Attestation by A with knowledge of the contents, when he was the owner, effect of—Civil Procedure Code (Act XIV of 1882), sec. 317—'Fraudulently.'

If *A*, with the knowledge that the recital in a sale-deed that the land, thereby conveyed, belongs to *B* and is in his (*B*'s) enjoyment as owner, attests the sale-deed executed by *B* in favour of the plaintiff he is estopped from setting up thereafter his title to the land, even though he (*A*) might be the certified purchaser of the same in court auction.

Sarat Chunder Dey v. *Gopal Chunder Laha* [(1892) L.R., 19 I.A., 203 at pp. 215 and 216], followed.

Cairncross v. *Lorimer*, [3 Macq., 829] and *Carr* v. *London and North Western Railway Company*, [(1875) L.R., 10 C.P. 307 at p. 317], referred to.

Sundara Ayyar, J.—*Obiter*: No actual or verbal representation is necessary to give rise to estoppel. It is no contravention of the rule enacted in section 317, Civil Procedure Code (Act XIV of 1882) to hold that *A* is estopped in such a case as even a title acquired by a statute may be waived just like a title under a private conveyance. It is fraudulent within the meaning of section 317, Civil Procedure Code on *A*'s part to have obtained a sale certificate in his name after his attestation.

Abdul Aziz v. *Kanthu Mullik*, [(1911) I.L.R., 38 Calc., 512], *Krishnan Chetty* v. *Vellaichami Thevan* [(1911) 21 M.L.J., 1077], *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti*, [(1896) I.L.R., 19 Mad. 200], *Bishan Dial* v. *Ghazi-ud-din*, [(1901) I.L.R., 23 All., 175], and *Monappa* v. *Surappa* [(1888) I.L.R., 11 Mad. 234], distinguished.

Sadasiva Ayyar, J. *Obiter*: Section 317, Civil Procedure Code, will be a bar only if plaintiff is obliged to set up as part of his case for relief the plea that *A* purchased in court auction as *benamidar* for *B*. After the Transfer of Property Act no waiver or transfer of rights can be recognised in the case of immovable property in the absence of a registered instrument. Having regard to the ordinary course of conduct of Indians in this Presidency, attestation by a person who has or claims any interest in the property covered by the document must be treated *primâ facie* as a representation by him that the title and other facts

* Second Appeal No. 182 of 1910.

relating to title recited in the document are true and will not be disputed by him in favour of the obligee under the document

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SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tanjore, in Appeal No. 42 of 1909, preferred against the decree of T. KRISHNASWAMI NAYUDU, the District Munsif of Mayavaram, in Original Suit No. 1 of 1908.

The facts of this case are set out in the judgment of SUNDARA AYYAR, J.

The Honourable Mr. *T. V. Seshagiri Ayyar* for the appellant.

T. R. Venkatarama Sastri for respondents Nos 4 to 6.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The suit in this case is for restraining first defendant from interfering with the plaintiffs' enjoyment of certain lands. The plaintiffs obtained a sale of it from the second defendant in 1906. Prior to the sale the land had been sold in execution of a decree against the second defendant in a small cause suit. The first defendant was the auction purchaser. The auction sale took place in June 1904. Admittedly the land previously belonged to the second defendant. The plaintiffs' case is that the auction purchase was really for the benefit of the second defendant and that the first defendant was only a *benamidar*. This plea has been upheld by both the Courts The first defendant set up his own title to the land as the real purchaser and he contended that section 317 of the Civil Procedure Code was a bar to the plaintiffs' suit. Both the lower Courts held that section 317 was not applicable in the circumstances of the case. There was an issue raised as to whether first defendant was estopped by his conduct from questioning plaintiffs' title. The conduct referred to consisted in the first defendant allowing the second defendant to remain in possession of the land for a period of about three years after the auction sale without taking any steps to assert his own title and in his attesting the sale deed executed by second defendant in plaintiffs' favor (Exhibit C). The first defendant stated that he made the attestation without any knowledge of the contents of Exhibit C But his story has been disbelieved by both the Courts. I am of opinion that this appeal may be disposed of on the issue of estoppel, Exhibit C was executed on the 9th July 1906. Till then the first defendant did not take steps to obtain a sale certificate, although the sale took place in April 1904 and it was confirmed in June 1904. His application for a certificate was made in 1907 after he had

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attested Exhibit C. Now Exhibit C recited that the land belonged to the second defendant and was in his enjoyment. And this document as found by the lower Courts was attested by the first defendant with full knowledge of its contents. The District Munsif found more against the first defendant. He was of opinion that there were good reasons to believe that "it was the first defendant who brought about the sale and it cannot therefore be doubted for a moment that his attestation and also that of his undivided son were obtained as security for the vendees in token of the first defendant having admitted that he was only a *benamidar* in respect of the land purchased in Court auction and which was with his full knowledge and consent included in the sale deed." The District Judge does not say that it was the first defendant who brought about the sale-deed. If he did so there could be no doubt that first defendant would be estopped from asserting his own ownership, subject to an argument of Mr. Seshagiri Ayyar which I shall hereafter notice that the rule of estoppel is not applicable to such a case. There are no reasons to believe that the District Judge did not really agree with the District Munsif in his observation as to the part taken by the first defendant in the matter of the execution of the sale-deed (Exhibit C). But it is not necessary to rest my judgment on the assumption that the District Judge intended to agree with the District Munsif. It would be quite enough if the first defendant with the knowledge of the recital that the land belonged to the second defendant and was in his enjoyment as owner attested the sale-deed executed by him to the plaintiffs. In the leading case of *Sarat Chunder Dey v. Gopal Chunder Laha*(1), the Judicial Committee of the Privy Council expounding the law of estoppel observe: "The principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by *conduct amounting to a representation*, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it." It is quite clear both from this exposition and from the words of section 115 of the Indian Evidence Act, themselves that no actual verbal representation is necessary to give rise to estoppel. It is quite enough

(1) (1892) L.R., 19, I.A., 203 at pp. 215 & 216.

that the conduct of a party leads another to act in the belief that he asserts no claim to the property. A passage from the judgment of Lord CAMPBELL in *Cairncross* v. *Lorimer*(1) is cited by the Privy Council in the judgment. "I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." Their Lordships go on to say: "These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply *a fortiori* in a case like the present, where the person estopped was a party to the transaction itself, which he, or others taking title from him, seek to challenge after a considerable interval of time." In *Carr* v *London and North Western Railway Company*(2), a very leading decision on the question of estoppel the following was one of the propositions laid down: "Another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." Here at the time of the execution of Exhibit C the first defendant was the ostensible purchaser at a court auction. The sale-deed was executed by the second defendant. Not only the first defendant, but his son also attested the document. It is impossible to doubt that the object of the attestation was to reassure the plaintiff in taking a sale deed from the second defendant when the ostensible purchaser at the auction sale was the first defendant. We have no hesitation in saying that the first defendant must be held to be estopped from asserting his own title to the land.

It was argued by Mr. Seshagiri Ayyar that section 317 embodies a rule of public policy and that there can be no estoppel

(1) 3 Macq. 829. (2) (1875) L R, 10, C P., 307 at p 317.

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contravening that rule. In my opinion there is no contraventio at all of the rule in section 317 in holding that the first defendan is estopped. Section 317 lays down the rule that where propert is brought to sale in Court auction a suit cannot be instituted o the ground that the defendant was only a benamidar fo the plaintiffs. The utmost that could be said in favour of th first defendant is that the effect of the section is to create som sort of title in him though this position is denied by th respondent. But assuming it to be so, what is there to preven a person who gets title, we shall suppose under a statute, from afterwards allowing it to be sold as the property of anothe person? I can find no reason why he should not do so any more than why a person having a title under a private convey ance should not allow it to be sold as the property of another The cases cited by Mr. Seshagiri Ayyar, viz., *Abdul Aziz* v. *Kanthi Mullik*(1), *Krisnan Chetty* v. *Vellaichami Tevan*(2), and *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti*(3) are all inapplicable to the case. The attempt there was to get behind the very rule itself enacted by the statute by setting up a contention of estoppel. I might also put this judgment on another ground. Section 317 provides, "nothing in this section shall bar a suit to obtain a declaration that the name of any person certified as aforesaid was inserted in the certificate fraudulently." After the first defendant attested Exhibit C which distinctly stated that the land belonged to the second defendant it was fraudulent on his part to have obtained in 1907 a sale certificate in his own name.

On these grounds the Second Appeal must be dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—As many of the questions argued in the Second Appeal are important questions, I do not think it inappropriate to add a few words of my own. If the plaintiffs are obliged to set up as part of their case for relief, the allegation that the first defendant made the purchase *benami* and cannot succeed except by proving that fact, I am inclined to hold that section 317 will be a bar to the suit. *I agree with the observations in Bishan Dial* v. *Ghazi-ud-din*(4), that although section 317 should be construed strictly the words of the section ought

(1) (1911) I.L.R., 38 Calc., 512.
(2) (1911) 21 M.L.J., 1077.
(3) (1896) I.L.R., 19 Mad., 200.
(4) (1901) I.L.R., 23 All., 175.

to be given effect to if they apply aptly to the plaint put forward by the plaintiff and I am also not inclined to try to whittle away the effect of the section as has been done in some cases by excluding from its operation cases where the suit is brought against the purchaser's representatives and assignee. I also agree with Mr. Seshagiri Ayyar that after the Transfer of Property Act no waiver or transfer of rights can be recognised in the case of immoveable property in the absence of a registered instrument. Hence the observations in *Monappa* v. *Surappa*(1), may not apply to cases of alleged transfer by the subsequent conduct of the *benamidar* or by an agreement with the *benamidar*, if such conduct or agreement took place after Act IV of 82 came into force. It is also clear as decided in *Krishnan Chetty* v. *Vellaichami Thevan*(2), that estoppel by itself cannot form the basis of the cause of action or claim. But in this case, the plaintiffs are in possession, possession is *primâ facie* evidence of title, the second defendant had conveyed all his rights to second plaintiff and plaintiff's vendor and could not therefore deny plaintiff's title, and if the first defendant as contended in paragraph 6 of the plaint is estopped by his conduct from asserting any title as against the plaintiffs, the plaintiffs need not rely at all upon and need not prove the allegation that their title is based upon the first defendant having purchased in the court auction sale as the *benamidar* of second defendant. They need only prevent the second defendant from claiming any title under the court auction purchase and this they could do by setting up the doctrine of estoppel.

As regards the question of estoppel also, though the District Judge does not in so many words say that the first defendant himself brought about the sale made by the second defendant to the second plaintiff and the first plaintiff's vendor, he says "it is possible to concur generally in the Lower Court's conclusions" except as regards two matters. One of the conclusions of the District Munsif in which the District Judge evidently so concurs seems to be that the first defendant did bring about the sale and did not merely attest the document (Exhibit C).

I am also of opinion that having regard to the ordinary course of conduct of Indians in this Presidency, attestation by a

(1) (1888) I.L.R., 11 Mad., 234. (2) (1911) 21 M.L.J., 1077

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person who has, or claims, any interest in the property, covered by the document must be treated *primâ facie* as a representation by him that the title and other facts relating to title recited in the document are true and will not be disputed by him as against the obligee under the document.

I therefore concur in the conclusion that the Second Appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. July 25 and 26.

G. VEERAYYA (MINOR BY MOTHER AND NEXT FRIEND NARAKKA, PLAINTIFF), APPELLANT,

v.

G. GANGAMMA (DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), sec 6 and art 125—Widow's alienation—Right of several reversioners, independent—Not questioned by deceased father for twelve years—Right of minor son to question after twelve years but within three years of attaining majority.

For the purpose of questioning an alienation made by a Hindu female possessing a limited estate one reversioner does not claim through another, and consequently laches on the part of a father who died without instituting a suit within twelve years from the date of the alienation does not disentitle his son from filing a suit for the purpose even after twelve years after the alienation, if he was a minor at the time and files the suit within three years of attaining majority.

Section 6 and article 125 of Limitation Act considered.

Govinda Pillai v. Thayammal [(1905) I.L.R., 28 Mad., 57], *Bhagwanta v. Sukhi* [(1900) I.L.R., 22 All., 33 (F.B.)], *Abinash Chundra Majumdar v. Hari Nath Saha* [(1904) 9 C.W.N., 25], *Sakyahani Ingle Rao Sahib v. Bhavani Boyi Sahib* [(1904) I.L.R., 27 Mad., 588], and *Chinnaveerayya v. Lakshmi Narasimha* [(1912) 22 M.L.J., 375], followed.

Mullapudi Ratnam v. Mullapudi Ramayya [(1902) I.L.R., 25 Mad., 731], and *Chhaganram Astikram v. Bai Motigavri* [(1890) I.L.R., 14 Bom., 512], not followed.

Chirurolu Punnamma v. Chirurolu Perrazu [(1906) I.L.R., 29 Mad., 390 (F.B.)], referred to.

Krishnier v. Lakshmiammal [(1908) 18 M.L.J., 275], distinguished.

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* Second Appeal No. 422 of 1911.

VEERAYYA v. GANGAMMA.

SECOND APPEAL against the decree of M. GHOSE, the District Judge of Cuddapah, in Appeal No. 77 of 1910, presented against the decree of T. RAJARAM RAO, the District Munsif of Cuddapah, in Original Suit No 44 of 1909.

The facts of this case are set out in the judgment.

Dr. S. Swaminathan for the appellant.

V. C. Seshachariar for the respondent.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT.—The plaintiff in this suit sued as a Hindu reversioner to declare an alienation made by the first defendant invalid as against his reversionary interest. The first defendant is the daughter of the plaintiff's senior paternal uncle. The plaintiff's case was that the property alienated was given to her for maintenance. This was denied on the part of the defendants. The District Munsif found that it was not proved to have been given for maintenance, but he, however, took the estate held by the first defendant to be a limited one. He also held that the suit was not barred by limitation and gave the plaintiff the declaration asked for On appeal, the District Judge begins his judgment by saying that the only point argued is one of limitation. In considering that point the Judge goes on to say that the Munsif having found that the grant was not for maintenance it must be presumed that it was an absolute gift to first defendant with full powers of alienation. If the first defendant had an absolute estate with right of alienation then the plaintiff would have no cause of action at all and there would be no question whether his suit for a declaration was barred. He then refers to *Bajrangi Singh* v *Manokarnika Singh*(1). The bearing of that case we suppose was taken to be that the plaintiff would not be entitled to impeach an alienation which his father who was living for some time after it was made did not attack This again has nothing to do with the question of limitation. Substantially therefore the District Judge has decided the case on the ground that the plaintiff has no cause of action We cannot regard this judgment as satisfactory and having regard to the statement that the question of limitation alone was argued we cannot accept the finding of the Judge that the first defendant had an absolute estate. We must confine ourselves to the question of limitation arising from the facts that the plaintiff's

(1) (1908) I L R, 30 All., 1 (P.C.).

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father did not sue to set aside the alienation in dispute and that more than twelve years had elapsed from date of alienation before this suit was brought.

The alienation in question was made in 1896. The plaintiff was then a minor of tender years. His father was alive. The father died without questioning the alienation. This suit was instituted in 1909 more than twelve years after the date of the alienation. It is contended for the respondent that under article 125 of the Limitation Act this suit must be held to be barred. That article applies to a suit during the life of a Hindu female by a Hindu who, if the female died at the date of instituting the suit, would be entitled to the possession of land to have such alienation of the land made by the female declared to be void except for her life; the period is twelve years and the starting point is the date of the alienation. Now the plaintiff in this suit is a person who would be entitled at the datesof the institution of the suit to the possession of the land if the first defendant then died. The plaintiff was a minor at the date of the suit. We may note that a question was raised with respect to the plaintiff's real age by the defendant but the issue framed to try it was not pressed and we must therefore proceed on the footing that the plaintiff was a minor. Applying section 6 of the Limitation Act the plaintiff's suit is not barred by limitation as he is entitled to institute it within three years after he attained majority. *Primâ facie* then his suit is not barred. But it is argued by the learned vakil for the respondent that as at the time of the alienation the plaintiff's father was alive and as the father could have instituted a suit for declaration the present suit must be taken to be barred because the cause of action for a declaratory suit is the same for both the father and son, and the son should be taken to claim through the father. This argument was considered and held to be untenable in *Govinda Pillai* v. *Thayammal*(1), by BENSON and DAVIES, JJ. The decision in that case is in accordance with the view taken by the Allahabad High Court in *Bhagwanta* v. *Sukhi*(2), and by the Calcutta High Court in *Abinash Chundra Majumdar* v. *Hari Nath Saha*(3). A different view was no doubt taken by the Bombay High Court

(1) (1905) I.L.R., 28 Mad., 57. (2) (1900) I.L.R., 22 All., 33 (F.B.)
(3) (1904) 9 C.W.N., 25.

in *Ohhaganram Astikram* v. *Bai Motigavri*(1). The judgment in that case proceeds on the ground that a remoter reversioner must be taken to claim through the immediate reversioners. As pointed out in *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(2), this view is not in accordance with the dicta of the Privy Council in several cases These dicta were again considered in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(3) a full bench decision. The case itself was one for a declaration with regard to an adoption. A distinction was made between suits for a declaration of the invalidity of an alienation made by a widow, and of the falsity of an alleged adoption or the invalidity of an alleged adoption made by a widow. In *Chinnaveerayya* v. *Lakshmi Narasimha*(4) the view laid down in *Sakyahani Ingle Rao Sahib* v. *Bavani Bozi Sahib*(2) was followed Mr. Seshachariar has called our attention to two decisions of this Court which he says support his contention. The first of these is *Krishnier* v. *Lakshmiammal*(5). There several daughters' sons of a Hindu proprietor instituted a suit for a declaration that certain alienations made by their grandmother were invalid. Some of the plaintiffs had attained their majority more than six years before the suit was instituted. But one of them was a minor within three years before the institution of the suit It was contended that the suit was not barred by limitation so far as the latter was concerned This argument did not prevail. The *ratio decidendi* may be stated in the words of the learned Judges who decided the case. " The plaintiffs are admittedly members of a joint Hindu family, and they would be entitled to succeed jointly to the estate of their maternal grandfather Anantha Krishnier if their mother, Lakshmi, were now dead—*Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(6) They would inherit his estate as ancestral property under the ordinary law of inheritance with right of survivorship. The first plaintiff was alive at the date of the alienations, and the right to sue accrued to the family on the date of the alienation—*Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(3) The first plaintiff attained majority many years ago and could have brought the present suit on behalf of the joint family " It is clear that the decision proceeded on the

(1) (1890) I.L.R., 14 Bom., 512
(2) (1904) I.L.R., 27 Mad., 588
(3) (1906) I.L.R., 29 Mad., 390 at p. 408
(4) (1912) 22 M.L.J., 375
(5) (1908) 18 M.L.J., 275.
(6) (1902) I.L.R., 25 Mad., 678 (P. C.).

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ground that the plaintiffs were all entitled to their maternal grandfather's property as their joint estate and that the suit could have been instituted by the eldest of them on behalf of all; and the decision in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1) is relied on as justifying this view. But as already stated this is not the view held by the Privy Council with respect to the right of reversioners to impeach an alienation made by a widow. The special considerations held to be applicable where the reversioners are daughters' sons inheriting the estate of their maternal grandfather cannot be held to apply to other reversioners. The other case on which Mr. Seshachariar relied is *Mullapudi Ratnam* v. *Mullapudi Ramayya*(2). There the alienation was made by the maternal grandmother of the plaintiff in 1874. A previous suit had been instituted for declaring the invalidity of the alienations by two of the daughters of the grandfather but had been withdrawn. The plaintiffs asked that the original alienations of 1874 as well as what was regarded as tantamount to an alienation by the plaintiffs in the previous suit in consequence of their withdrawing it be set aside. It was held that the withdrawal gave a fresh cause of action to the plaintiff and the suit was held to be not barred. The learned Judges, however, observe: "The judge is right in holding that in so far as the alienation of 1874 is concerned this suit is barred by limitation." No reasons are given in support of this opinion and notwithstanding the high authority of the learned Judges who decided it we are with all deference constrained to differ from their view. We must hold that the suit is not barred by limitation assuming that the first defendant had only a limited estate in the property alienated.

We reverse the decree of the District Judge and remand the appeal for disposal on the other questions raised including the question of the extent of the first defendant's estate in the case. Costs in the Second Appeal will abide the result.

(1) (1902) I.L.R., 25 Mad., 678 (P.C.). (2) (1902) I.L.R., 25 Mad., 731.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

GANAPATHI AIYAR (PLAINTIFF), APPELLANT,

v.

SIVAMALAI GOUNDAN AND THREE OTHERS (SECOND DEFENDANT'S LEGAL REPRESENTATIVES AND FIRST DEFENDANT), RESPONDENTS.*

1912. August 1.

Executor, sale by, validity of—Powers of an executor—Executor happening to be guardian, effect of—Limitation Act (XV of 1877), arts. 44 and 91—What must be proved before setting aside a sale by an executor—Onus—Executor under Probate and Administration Act (V of 1881)—Sale without Probate or Letters of Administration, validity of.

In the absence of proof that a sale by an executor was not a proper act of administration and was not required for the purpose of discharging debts of the deceased, and that the vendee was a *mala fide* purchaser having knowledge that the sale was not in due course of administration, the onus of proving all which lies on the party attacking the sale, the sale is valid and binding on all.

The validity of a sale by one clothed with the powers of an executor must be tested with reference to the powers and duties of an executor, and it cannot be regarded or attacked as a sale by a guardian even if the executor actually happen to occupy the position of a guardian with reference to the plaintiff, a legatee under the will. Hence article 44 of the Limitation Act (XV of 1877) is inapplicable to such a sale. Nor is article 91 applicable to the case as it cannot be said that the plaintiff, a legatee could not succeed in recovering the property without setting aside the alienation, which was made neither by him nor by any one through whom he claims the property as heir, the validity of the sale depending on considerations aforesaid, with reference to the powers of an executor.

An executor's title is derived from the will, and an executor under the Probate and Administration Act (V of 1881) unlike an executor under the Indian Succession Act or the Hindu Wills Act can clothe his vendee with full title, even without obtaining any Probate or Letters of Administration.

Sheik Moosa v. Sheik Essa [(1884) I.L.R., 8 Bom., 241] and *Mathuradas Lowji v. Goculdas Madhowji* [(1886) I.L.R., 10 Bom., 468] followed.

Sarat Chandra Banerjee v. Bhupendra Nath Basu [(1898) I.L.R., 25 Calc., 103], considered and explained.

Sections 2, 4 and 45 and the preamble and heading of chapter II of Act V of 1881 considered.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Coimbatore, in Appeal No. 106 of 1910,

* Second Appeal No. 523 of 1911.

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preferred against the decree of S. R. KRISHNA AYYAR, the District Munsif of Erode, in Original Suit No. 480 of 1908.

The facts of this case are clearly set out in the following judgment.

T. M. Krishnaswami Ayyar for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondents Nos. 1 to 3.

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JUDGMENT.—The plaintiff as legatee under a will sues to recover certain properties which were sold by the first defendant, his natural father and the executor under the will, to the second defendant in 1897. The suit was instituted in 1908. The plaint alleged that the sale was not binding on the plaintiff. The second defendant contended that the first defendant had authority to sell and that the sale was made for discharging certain debts due by the deceased testatrix. The District Munsif held that the sale was not binding on the plaintiff and gave a decree in his favour. On appeal the District Judge disposed of the case on the question of limitation. He held the suit barred as it was instituted by the plaintiff more than three years after the date of his attaining majority; he regarded the suit as one to set aside an alienation made by a guardian and applied article 44 of the Limitation Act. The second defendant has not contended that the sale was made by the first defendant in his capacity as guardian. We are of opinion that the finding on the question of limitation cannot be upheld. The first defendant was executor and he had the powers of an executor. His right to deal with the estate must be regulated by rules relating to the powers and duties of an executor subject to any express provisions that may be contained in the will. There are in the will in this case no provisions either restricting or extending the scope of the executors' powers. The act cannot be regarded as having been done by the executor as a guardian when his powers were regulated by the rules relating to an executor. Article 44 of the Limitation Act must therefore be held to be inapplicable. Mr. Govindaraghava Ayyar contends that article 91 must govern the case. We cannot agree with him; we do not think that the plaintiff could not succeed in recovering the property without setting aside the alienation. The alienation was not one made by him or by any one from whom he claims the property as heir. The executors' alienation would be binding on the plaintiff if it was valid; if it

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was not, it would have no effect as against him. It cannot be held to be a transaction binding on him until he set it aside, although no doubt he could ratify the act done by the executor. No authority has been cited in support of the application of article 91 in such a case. We hold it is not applicable. The District Judge has not recorded any finding on the merits of the case, that is, on the question whether the alienation is binding on the plaintiff. We propose to decide the question ourselves instead of remanding the case for decision by the Appellate Court. The plaint does not contain any allegation that the second defendant was aware that the sale was not a proper act of administration, and was not required for the purpose of discharging debts of the deceased. Undoubtedly the plaintiff was bound to allege it and the onus would be on him to show that the second defendant's conduct disentitled him to the protection which alienees from executors are entitled to under the law. If, therefore, the first defendant was at the date of the sale entitled to exercise the powers of an executor, the sale must be upheld. But it was argued by Mr. T. M. Krishnaswami Ayyar for the appellant that as Probate had not been obtained of the will or Letters of Administration taken out with the will annexed, the first defendant could not exercise the powers of an executor. He urges that the property of the deceased testator would vest in the first defendant only if and when he took out Probate or Letters of Administration and as he never did so, he never became possessed of the status and powers of an executor. We are unable to uphold this contention. There is no provision in the Probate and Administration Act which requires a person appointed as executor under a will to take out Probate or Letters of Administration. Section 187 of the Indian Succession Act which provides that no right as legatee or executor under a will can be enforced unless Probate or Letters of Administration have been taken out has not been enacted in the Probate and Administration Act. It was imported into the Hindu Wills Act, but it was apparently for very good reasons considered undesirable to embody it in the Probate and Administration Act. Under section 4 of the Act all the property of the deceased rests in the executor as such. Probate is not necessary to make a person an executor. His title is derived under the will. If section 187 of the Succession Act had been imported into the Probate and Administration Act,

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then neither the executor nor any persons claiming as alienees under him would be entitled to enforce any right as executor or alienee. But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate. This was the view taken in *Sheik Moosa* v. *Sheik Essa*(1) and *Mathurádás Lowji* v. *Goculdas Madhowji*(2). In the former case SARGENT, C.J., states that the law is the same in this country as in England as to the title of an executor to the property devised by a will; that probate is regarded as the authentic evidence of the will itself from which the executor derives his title and by virtue of which the property vests in him from the death of the testator from which time the executor would be entitled to collect the debts due to the deceased. Mr. Krishnaswami Iyer has referred us to a case, *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu*(3); but the question in that case was as to the validity of a sale made by an executor under a Hindu will in the year 1864 long before the Probate and Administration Act was passed. It was contended on behalf of the alienee that the acts of the executor were as valid as if they had been done after Act V of 1881 had come into force. Reliance was placed on section 2 of Act V of 1881 which lays down that "chapters II to XIII, both inclusive, of this Act shall apply in the case of every Hindu, Muhammadan, Buddhist and of every person exempted under section 337 of the Indian Succession Act of 1865 dying before or after the said 1st day of April 1881." The argument was that as the provisions of the Act were applicable to the case of a Hindu dying before April 1881 and the executors under the will in question had the powers given by the Act. It would probably have been quite enough to observe in answer to such an argument that no person could in 1864 have powers which were given to an executor only in 1881, though some other provisions of the Act of 1881 might be applicable to wills made before that date. For instance Probate of a will made before 1881 could be obtained under the provisions of that Act. Before the Probate and Administration Act was passed, when there was no *provision for granting Probate or Letters of Administration* with

(1) (1884) I.L.R., 8 Bom., 241. (2) (1886) I.L.R., 10 Bom., 166.
(3) (1898) I.L.R., 25 Calc., 103.

respect to Hindu wills, the possession of a Hindu executor was taken to be that of a mere manager and not of one in whom the legal estate in the properties of the deceased vested whether by virtue of section 4 of Act V of 1881 the property of the deceased could be taken to have vested immediately on the death of the deceased in a person appointed as executor by a will made before 1881, it is unnecessary to consider. But apparently the learned judges who decided the case regarded the executors' powers as depending on the question whether the title vested in him on the death of the deceased. There are no doubt observations to be found in the judgment of those learned judges which would show that in the case of a Hindu dying before April 1881 if the executor or administrator should wish to get the benefit of section 4 of the Act, he should come in and prove the will and take out Probate or Letters of Administration and reference is made to the preamble of the Act and the heading of chapter II in which section 45 is to be found, the preamble stating that it is desirable to provide for the grant of Probate of Wills and Letters of Administration to the estates of certain persons and the heading of chapter II being "Grant of Probate and Letters of Administration." The inference is apparently drawn that a party could obtain the benefits of the provisions of the Act only by obtaining Probate or Letters of Administration, but this inference so far as this decision is concerned is expressly limited to the case of a Hindu dying before April 1881. We cannot assume that the learned judges would have taken the same view with respect to wills made by a person who died after 1881. If the learned judges had taken the view, which we do, that no executor could before 1881 claim powers which were for the first time given by that Act, they would probably not have considered it necessary to rest their decision on the ground that a person who did not take out Probate of the will of a testator who died before 1881 could not claim the benefit of any of the provisions of the Act. We do not think that either the preamble or the heading of chapter II requires such a construction to be put on the words of section 4. That section certainly does not relate to the grant of probate and would be beyond the scope of the heading and the preamble; the fact is that the Act contains many provisions which would not strictly come within either The first defendant in this case in our opinion had as an executor the power to sell the estate for

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convenient than that which the defendant obstructed and that the plaintiff did not act rightly in not sowing his fields.

On appeal, the Subordinate Judge held that the other way which the plaintiff could have used was not one along which *carts could pass during the rains, that it was sandy*, that there were boulders here and there and that it was on the whole a hazardous route. To use his own words the plaintiff was not bound "to tempt his fate by attempting to get into his field through that hazardous round-about route." He was of opinion that the plaintiff was entitled to recover damages sustained by him by the lands lying waste. We may observe that the District Munsif found that the plaintiff's lands were really dry lands and that it was not necessary to pass to them during the rainy season. We cannot take the Subordinate Judge to have found that it was not reasonably possible for the plaintiff to avail himself of the other route to pass to his lands. The Subordinate Judge awarded a sum of Rs. 177 as damages for loss of crops. He did not give the plaintiff any damage for the injury sustained by him by the interference with his right of easement on the ground that it affected the evidence of his right. The defendant who has appealed from the decree of the Subordinate Judge contends that the damages have been assessed on a wrong principle and that the plaintiff is not entitled to damages for loss of crops. It is argued that the plaintiff was bound to diminish the damages he might sustain by the obstruction of the way by doing all that he reasonably could by finding another way to the lands he had to cultivate and he asks us to apply the same principle to the assessment of damages in an action on tort as would ordinarily apply to an action for damages for breach of contract. He draws our attention to paragraph 203 of 'Sedgwick on Damages.' It is not necessary to discuss at any length in this case how far the principle that the plaintiff is bound to avoid the damages caused by the defendant's breach of contract would be applicable to action on tort But it cannot be denied that alike in actions on contract and on tort the damages which the plaintiff is entitled to must result directly from the wrongful act of the defendant and that no claim can be made to damages which are only remotely connected with it. This is in reality the basis of the rule that the plaintiff should avoid or diminish the damages as far as he could. The learned author cited by

the appellant observes: "It is frequently said that it is the *duty* of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequence which the plaintiff, acting as prudent men ordinarily do, can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as *remote*. In this view the doctrine would rest on the intervention of the plaintiff's will as an independent cause. *Ad hoc* he is not damaged by the defendant's act but by his own negligence or indifference to consequences." This principle applied to actions on contract would readily lead to the rule enunciated in somewhat different words that it is the duty of the plaintiff to reduce the damages as far as possible; for a breach of contract consists in the defendant's failure to do a certain act that he is bound to do. That failure by itself would not result in damages for it is quite open to the plaintiff if he could obtain the result which he expected from the defendant's performance of the contract by other measures which an ordinarily prudent man would adopt A tort, on the other hand, may consist in the defendant's failing to do an act which he is bound to do or in doing one which he ought not to do or in preventing the plaintiff from doing an act which he is entitled to do. Therefore there may be differences in the application to actions on tort of the basic principle which is no doubt common to both kinds of actions, viz , the damages should be the direct consequences of the wrong complained of. In this case, the defendant's wrong consisted in his preventing the plaintiff from doing something that he was entitled to do. The mere prevention does not directly lead to the non-cultivation of the lands The loss of produce was the result of the lands lying uncultivated No doubt the plaintiff might show that in consequence of the wrong it was not reasonably possible for him to cultivate. But unless he could show this he could not claim the damages resulting from non-cultivation In the same work, the learned author referring to the decided cases in support of his position says: "So too the loss of crops is not the proximate result of deprivation of an animal by which the owner intended to harvest the crops, consequently in an action for deprivation of the animal no compensation can be recovered for loss of the crop. So where through deprivation of the use of an agricultural machine or through a

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and disguise themselves in imitation of tigers and to dance in the public streets. On the afternoon of the day in question the Coimbatore Town Inspector began (so far as appears) to enforce an old order of the District Magistrate embodied in a book of Standing Orders (Exhibit A) prohibiting persons from thus dancing as tigers without license from the police. Between about 5 and 6 P.M. he stopped the dancing of five unlicensed men; the last two of whom are the present second and twenty-third accused. These men were dancing near the station, and to secure compliance with his command the Inspector first took away the "tails" they were wearing and then partially washed the paint of their faces. The two men nevertheless resumed dancing, and the Inspector incensed at their disobedience, appears to have gone out and beaten them with a stick. By this time a considerable crowd had collected and the "taboot" procession in its progress through the town had arrived close to the station. Apparently the processionists sympathised with the "tigers" and declined to proceed unless the tails were restored. Matters began to look serious, and the Inspector, who had retired to his room up-stairs in the station, wrote a note to the Reserve Inspector calling for assistance. The exact time at which this note was written and at which it was despatched is not clear; but the Inspector appears to have given the mob to understand that he had sent for the reserve, probably meaning to frighten them. Unfortunately it produced the opposite effect; they realised that if anything was to be done no time must be lost, and made a rush for the station shouting "deen, deen." The small force of constables who endeavoured to stop them was driven back with sticks and stones; and the mob entered the station. Some of the police took refuge upstairs, others in the Station House Officer's room below. This was forced open and a bonfire was made in the road in which a good deal of the station furniture was consumed. The record room was fired and the records burnt; and the staircase was also set fire to, so that the Inspector and his companions upstairs were in considerable danger of their lives. The Inspector escaped by the roof and one or two others from a window, but the remainder, including a European lady, the wife of an European Sergeant of the Reserve Police, were only rescued by the arrival of the Police Reserve at about 7-40, and the dispersal of the mob

Upon the above facts, which are deposed to by 25 prosecution witnesses and are practically beyond dispute, 23 persons who are said to have been members of the mob which attacked the station have been put on their trial for offences under sections 147, 153, 436, 457 and 149, Indian Penal Code. A jury was empanelled to try the charge under section 457, the jurymen sitting as assessors on the other charges. A majority of the jury found eight of the accused (Nos. 6, 7, 11, 13, 16, 20, 21 and 23) guilty of an offence under section 457, and the rest not guilty. The Judge disagreeing with the verdict of "guilty" has referred the case of the above eight persons for the orders of this court under section 307, Criminal Procedure Code, and has acquitted the remaining accused on all the charges. From his judgment and the letter of reference, he appears to be of opinion that no offence whatever has been brought home to any of the accused persons Government, on the other hand, has appealed against the acquittal of the 15 accused whom the jury found "not guilty."

As far as the case of the eight persons found guilty by the jury is concerned, the effect of the reference is to open up the whole case and to render it our duty to consider whether the evidence against each is sufficient to justify a conviction for all or any of the offences charged But as regards the others, who have been found "not guilty," we can only go into the evidence, if we find such misdirection in the charge or irregularity in the procedure, as would, in our opinion, have occasioned a failure of justice. This, then, must be the first point for consideration.

Now, as pointed out by the learned Advocate-General, the procedure of the Sessions Judge is distinctly irregular in more points than one. It is thus set forth in paragraphs 5 and 6 of his judgment

"After the evidence of the prosecution was closed, I asked the vakil for the defence to examine, in the first instance, certain witnesses who he stated would prove clear *alibis* for the eighteenth and nineteenth accused as these witnesses seemed to be the principal witnesses on whom he relied There was a host of other witnesses cited for the defence, and it seemed to me that the quickest way of getting through the case would be for the vakils and myself to sum up first on the case generally, and then on the case as against each of the accused, one by one, leaving

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it to the jury to say if they wished to hear the witnesses for the defence cited by him or were prepared to find that the prosecution had not made out a case against him. This procedure was followed until the case of the sixth accused was reached. By that time it appeared that too much time was taken up by speeches and as the vakil, who represented all the accused, then stated that he intended examining only a few of the host of witnesses cited, he was asked to examine them at once in a batch. After all these witnesses had been examined, the vakils on both sides summed up once for all. I then summed up first generally on the facts to recall the salient points in the case to the jury, and after that with regard to the evidence for and against each accused person, starting from the sixth accused."

It is no doubt desirable that the case against each of the several accused should be clearly and distinctly presented to the jury, and the procedure laid down in the Code is quite compatible with his being done. But section 297, Criminal Procedure Code, specifically enacts that the Judge shall only charge the jury "when the case for the defence and the prosecutor's reply . . . . are concluded," *i.e.*, after all the evidence has been taken on both sides and counsel on both sides have finished addressing the jury. The Judges charge to the jury in the case of accused Nos 1 to 5 was clearly premature and contrary to the sections above quoted. The Judge was no doubt swayed by the laudable desire to save time; but, as he himself admits, that object was not attained and as he further acknowledges (paragraph 98 of his charge to the jury) in at least one instance arguments adduced on behalf of one accused (sixth accused) led him to materially alter his view of the reliability of certain evidence against earlier accused, in whose case a verdict had already been recorded.

It may be argued that this irregularity cannot be said in itself to have affected the issue of the case, but the next divergence from the procedure laid down in the Code is of a more serious nature and is opposed to a fundamental principle of the scheme of trial by jury. Section 303, Criminal Procedure Code, says that "the jury shall return a verdict on all the charges" and by "verdict" should be understood the collective opinion of the jury as a body, arrived at after mutual consultation, and ascertained and announced by the foreman. In cases of disagreement

among the jury, the individual opinions of members are never intended to be disclosed. In the present case except in the case of accused Nos. 1, 2, 4 and 5 regarding whom the procedure adopted is not certain, the record makes it clear that no verdict in this sense has been recorded at all In the case of accused Nos. 6 to 23, the Judge has called on each member of the jury individually to answer a series of questions, of which he was furnished with a typed copy and which run as follows :

"(1) Do you find this accused guilty of any offence? (2) If you find him guilty of any offence, then what do you find was the common object of the unlawful assembly at the time when it is proved by reliable evidence he was last seen in the unlawful assembly ? (3) What offences, if any, do you find were committed by the accused personally ? (4) Do you find on the evidence that any other members of the unlawful assembly committed any other offences, besides those, which this accused personally committed during the time this accused was a member of the unlawful assembly ? (5) Do you find on the evidence that this accused knew that such other offences as were committed by other members of the unlawful assembly during the time he was still a member of the assembly were offences likely to be committed in pursuance of the common object of the assembly at that time?"

In the case of the third accused, these questions do not appear to have been put ; but the individual opinion of each member of the jury has been recorded as to the accused's guilt of an offence under section 457 as well as of offences triable with the aid of assessors. In other words he has treated the jury exactly as if they were assessors in relation to the charge under section 457, except that he has not felt authorised to override the opinion of a majority of them where it is in opposition to his own.

In the case of the third accused, there is a further serious irregularity. As regards the offence under section 457, Indian Penal Code, three of the five jurors expressed individual opinions that the accused was guilty. As already explained, this can hardly be regarded as a "verdict" in the proper sense of the term at all, but if it be so treated, it is perfectly clear and specific and the only course open to the Judge were either to accept it or to refer the case to the High Court under section 307, Criminal Procedure Code. He has done neither: but on the

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day following that on which these opinions were recorded has twice questioned the jury, the second occasion being after a verdict (or what passed for a verdict) of "not guilty" had been returned regarding the fourth accused. Under section 303, Criminal Procedure Code, "the Judge may ask the jury such questions as are necessary to ascertain what their verdict is" and under section 304 "when by accident or mistake a wrong verdict is delivered the jury may before or immediately after it is recorded amend the verdict," but it has been repeatedly laid down that the Judge is only entitled to question the jury as to their verdict where it is ambiguous or incomplete, which was certainly not the case here, nor was it a case within the scope of section 304. The Judge's procedure was therefore at variance with the law, and we may add that even the final answers of three of the five jurors which the Judge interpreted as a verdict of "not guilty," are not consistent with each other on a proper view of the law and can only have been given under a misapprehension of the law in a very important particular to which we shall refer later on.

[Their Lordships here considered at length the Judge's charge to the jury and held that it contained numerous exaggerated and unfair comments upon the prosecution case. The judgment continued] :—

We can only come to the conclusion that the cumulative effect of such comment amounts to positive *misdirection* which the irregularities in the procedure which we have previously dealt with and in particular the individual questioning of the jury are such as to render it certain that they would exercise a most potent influence over the decision of the jury in the case of all the accused. It therefore becomes necessary to examine the evidence in the case of the acquitted persons as well as in the case of the eight convicted persons referred by the Judge under section 307, Criminal Procedure Code, in order to ascertain whether the verdict was erroneous and amounted to a miscarriage of justice. Their Lordships here considered the evidence and held that in the case of accused Nos. 3, 4, 8, 9, 14, 17 and 22 the acquittal by the jury was erroneous and was due to the misdirection of the Sessions Judge, and under section 423, Criminal Procedure Code, found them guilty of the offences charged.

In the case of accused Nos. 6, 7, 11, 13, 16, 20 and 21 also their Lordships convicted them of all the offences charged. Each

of these accused was sentenced to two years rigorous imprisonment.

Accused Nos. 1, 2, 10, 12, 15, 18, 19 and 23 were acquitted.]

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

V T KUNCHI AMMA AND FIVE OTHERS (DEFENDANTS NOS. 2 TO 7), APPELLANTS,

1912, August 8 and 9.

v

V. T. AMMU AMMA AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Malabar Law—Want of harmony among some members—Separate living of one—When entitled to separate maintenance

A junior member of a Malabar tarwad, leaving the tarwad house on the ground that he or she does not feel quite comfortable there or is not able to live there in complete harmony with others so as to ensure happiness is not entitled to separate maintenance if he or she was responsible for the discomfort complained of When a junior member will be entitled to separate maintenance, considered.

SECOND APPEAL against the decree of K IMBICHUNNI NAIR, the District Judge of South Malabar at Calicut, in Appeal No. 59 of 1910, preferred against the decree of T V. NARAYANAN NAIR, the District Munsif of Ottapalam, in Original Suit No. 294 of 1908.

The facts of this case are clearly stated in the judgment

The Honourable Mr. *J. L Rosario,* the Acting Advocate-General for the appellants.

K. P. M. Menon for the first respondent

JUDGMENT.—This is a suit by a lady belonging to a Marumakkathayam Nair tarwad in Malabar for arrears of maintenance and the question debated between the parties is whether the circumstances under which she left the house and lived away in a separate house during the period for which she claims maintenance

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

* Second Appeal No. 336 of 1911

PUBLIC PROSECUTOR v. ABDUL HAMEED — BENSON, AG C.J., AND AYLING, J.

day following that on which these opinions were recorded has twice questioned the jury, the second occasion being after a verdict (or what passed for a verdict) of "not guilty" had been returned regarding the fourth accused. Under section 303, Criminal Procedure Code, "the Judge may ask the jury such questions as are necessary to ascertain what their verdict is" and under section 304 "when by accident or mistake a wrong verdict is delivered the jury may before or immediately after it is recorded amend the verdict," but it has been repeatedly laid down that the Judge is only entitled to question the jury as to their verdict where it is ambiguous or incomplete, which was certainly not the case here, nor was it a case within the scope of section 304. The Judge's procedure was therefore at variance with the law, and we may add that even the final answers of three of the five jurors which the Judge interpreted as a verdict of "not guilty," are not consistent with each other on a proper view of the law and can only have been given under a misapprehension of the law in a very important particular to which we shall refer later on.

[Their Lordships here considered at length the Judge's charge to the jury and held that it contained numerous exaggerated and unfair comments upon the prosecution case. The judgment continued] :—

We can only come to the conclusion that the cumulative effect of such comment amounts to positive misdirection which the irregularities in the procedure which we have previously dealt with and in particular the individual questioning of the jury are such as to render it certain that they would exercise a most potent influence over the decision of the jury in the case of all the accused. It therefore becomes necessary to examine the evidence in the case of the acquitted persons as well as in the case of the eight convicted persons referred by the Judge under section 307, Criminal Procedure Code, in order to ascertain whether the verdict was erroneous and amounted to a miscarriage of justice. Their Lordships here considered the evidence and held that in the case of accused Nos. 3, 4, 8, 9, 14, 17 and 22 the acquittal by the jury was erroneous and was due to the misdirection of the Sessions Judge, and under section 423, Criminal Procedure Code, found them guilty of the offences charged.

In the case of accused Nos. 6, 7, 11, 13, 16, 20 and 21 also their Lordships convicted them of all the offences charged. Each

of these accused was sentenced to two years rigorous imprisonment.

Accused Nos. 1, 2, 10, 12, 15, 18, 19 and 23 were acquitted]

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. August 8 and 9.

V T KUNCHI AMMA AND FIVE OTHERS (DEFENDANTS Nos. 2 TO 7), APPELLANTS,

v

V. T. AMMU AMMA AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

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A junior member of a Malabar tarwad, leaving the tarwad house on the ground that he or she does not feel quite comfortable there or is not able to live there in complete harmony with others so as to ensure happiness is not entitled to separate maintenance if he or she was responsible for the discomfort complained of. When a junior member will be entitled to separate maintenance, considered.

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The facts of this case are clearly stated in the judgment.

The Honourable Mr. *J. L Rosario*, the Acting Advocate-General for the appellants.

K. P. M. Menon for the first respondent

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT —This is a suit by a lady belonging to a Marumakkathayam Nair tarwad in Malabar for arrears of maintenance and the question debated between the parties is whether the circumstances under which she left the house and lived away in a separate house during the period for which she claims maintenance

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* Second Appeal No. 336 of 1911.

MUTHU AMMA v. GOPALAN.

Maravadi v. *Panikkar* (1912) 22 M.L.J., 309, followed.

Parvathi v. *Kamaran* (1883) I.L.R., 6 Mad., 341, referred to

Obiter.—The Marumakkathayam law of maintenance is the same as the Aliyasanthana law prevailing in South Canara.

SECOND APPEAL against the decree of M. J. MURPHY, the District Judge of North Malabar in Appeal No. 173 of 1910, preferred against the decree of P. S. SESHA AYYAR, the District Munsif of Cannanore, in Original Suit No. 450 of 1909.

The facts of this case are stated in the judgment.

The Honourable Mr. *T. Richmond* for the appellant.

The Honourable Mr. *J. L. Rosario,* the Acting Advocate-General for the first respondent.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT.—The plaintiffs in the suit are a Nair lady and her children and the suit is for maintenance for a period of 27 months against their *karnavan* and the other members of the tarwad. The plaintiffs are living with the husband of the first plaintiff who is also the father of the other plaintiffs. The defence is that as plaintiffs are living away from the tarwad house they are not entitled to maintenance. There is allegation in the plaint that the first plaintiff's husband is not possessed of sufficient means to maintain her and her children in comfort. The written statement alleges that according to the practice in North Malabar a Nair lady is taken to her husband's house after the *potamuri* or marriage and that, while she is living with her husband, she is not entitled to any maintenance from her tarwad. The District Munsif dismissed the suit on the ground that a member of a Marumakkathayam tarwad is generally entitled to maintenance only while residing in the tarwad house and that the decisions which have allowed separate maintenance to a member living away from the tarwad do not cover a case like the present one. He also refers to *Parvathi* v. *Kamaran*(1) where it was held that a male member of a Marumakkathayam tarwad is entitled to an allowance for his consort and children living with him, that is, in computing the amount to which he is entitled for his own maintenance the fact that he has to maintain a wife and children should be taken into account. The Munsif then refers to the fact that " the present day husband of a Marumakkathayam female expects her to live with him and that it is even considered derogatory for the husband to have to visit his wife in her house."

(1) (1883) I.L.R., 6 Mad., 341.

He continues: "I do not deny that indications of such notions are apparent in the country, but side by side with such notions, it is to be hoped, is also growing up another notion that the husband is responsible for the bringing up of his wife and children. A husband who considers it derogatory to visit his wife in her house ought certainly to consider it disgraceful that his wife and children when living with him in his own house should be maintained at the cost of the wife's tarwad." The District Judge called for a finding on the question whether the plaintiffs were living with the first plaintiff's husband with the express consent of their *karnavan*. The District Munsif submitted a finding stating that it was the practice for the members of the wife's tarwad to send her to her husband's house in a formal manner. This necessarily indicates their consent The Munsif observed that beyond this there was no other consent. The District Judge is apparently of opinion that this did not amount to express consent. We are unable to understand how persons who send their girl to her husband's house can be said not to consent in as express a manner as possible to her leaving them and living with her husband. The important question that arises for decision is whether according to the Marumakkathayam law a wife living with her husband in her husband's house is entitled to maintenance from her tarwad. The Marumakkathayam law of maintenance which is the same as the Aliyasanthana law prevailing in South Canara was reviewed at great length recently in a judgment to which one of us was a party [*Maravadi* v. *Panikkar*(1)], and the conclusion arrived at in that judgment was that a member of a tarwad who leaves the tarwad house for a justifiable or proper purpose would be entitled to enforce his or her right to share in the tarwad property by receiving maintenance out of it and that separate residence could not be a reason for refusing maintenance. The basis of the right to maintenance has been fully explained there. It is also indicated in that case that the desirability of living with one's husband is a good cause for a lady to live away from the tarwad house. It was argued there that custom was against it The answer given was that the custom of all members of a tarwad living together is only a social custom. Some social customs may change without affecting the legal

(1) (1912) 22 M.L.J. 309

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